115 U.S. 512.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~323~~ 57

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

VINCENT TERRY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED OCTOBER 7, 1882.

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1 The United States of America to Vincent Terry or Geo. P. B. Jackson, his attorney of record, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The Missouri Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas A. Sherwood, chief justice of the supreme court of the State of Missouri, this eleventh day of July, in the year of our Lord one thousand eight hundred and eighty-two.

T. A. SHERWOOD,
Chief Justice of the Supreme Court of Missouri.

2 I hereby acknowledge service of the within notice or citation, this 12th day of July, 1882, reserving all legal objections to the same, or to the proceedings concerning which said notice or citation is given.

GEO. P. B. JACKSON,
Att'y for Vincent Terry.

[Endorsed:] Supreme court of Missouri. Vincent Terry, res., *vs.* The Missouri Pacific Railway Company, app. Citation. Filed July 15th, 1882. Henry W. Ewing, clerk, by E. B. Ewing, D. C.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Missouri before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Vincent Terry *v.* The Missouri Pacific Railway Company, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done

therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this thirtieth day of June, in the year of our Lord one thousand eight hundred and eighty-two.

Issued at office in the city of [St.] Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL] M. M. PRICE,
Clerk of said Circuit Court,
By T. L. CRAWFORD, *Deputy.*

Allowed by—
T. A. SHERWOOD, *C. J. S. C. Mo.*

4 [Endorsed:] No. —. Supreme court for the State of Missouri. Vincent Terry, res., *vs.* The Missouri Pacific Railway Company, app. Writ of error to supreme court of the State of Missouri. Filed July 12, 1882. Henry W. Ewing, clerk, by E. B. Ewing, D. C.

5 STATE OF MISSOURI, *ss:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, in obedience to the mandate of the within writ, herewith transmit to the honorable Supreme Court of the United States, at Washington, a full, true, and complete transcript of the record and proceedings in the within entitled cause, as fully as the same remain of record and on file in my office.

In testimony whereof, I hereto set my hand and affix the seal of said court at office, in the city of Jefferson, this — day of September, A. D. 1882.

[SEAL.] HENRY W. EWING, *Clk,*
By E. B. EWING, *D. C.*

6 STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, to wit, on the 1st day of April, 1882, a transcript was filed in the office of the clerk of the supreme court of the State of Missouri, which is in the words and figures following, to wit:

7 STATE OF MISSOURI, *County of Pettis:*

Pleas before the circuit [court] of Pettis county, at a term begun and holden in the city of Sedalia, county and State aforesaid, on the 2nd day of May, 1881, before the Honorable John P. Strather, judge of the sixth judicial circuit of the State of Missouri.

VINCENT TERRY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Be it remembered that heretofore, to wit, on the 21st day of April, 1880, a petition was filed in the above-entitled cause in the office of

the clerk of the circuit court, in and for the county of Pettis, in words and figures following, to wit:

Transcript Petition Missing.

(Petition missing and cannot be found.)

And afterwards, to wit, on the 13th day of September, 1880, it being the third day of the September term aforesaid, the following proceedings were had in said cause:

Record Entry No. 1.—*Motion to Dismiss Appeal.*

VINCENT TERRY *vs.* MO. PAC. R'Y CO.

Now at this day comes the plaintiff, by his attorney, and files his motion to dismiss the appeal herein.

8 And afterwards, to wit, on the 17th day of September, 1880, it being the 7th day of the September term, 1880, the following further proceedings were had in said cause, to wit:

Record Entry No. 2.—*Motion to File Transcript.*

VINCENT TERRY *vs.* MO. PAC. R'Y CO.

Now at this day comes the defendant, by its attorney, and suggests a dimunition of the record of J. W. Harrison, justice of the peace, and, on motion of defendant, the court makes a rule requiring said justice to file in the office of the clerk of this court, within sixty days after the adjournment of this term of court, a true and correct transcript of, off the docket, entries and all the papers filed with him in this cause.

And afterwards, to wit, on the 27th day of January, 1881, it being the 21st day of the January term, 1881, the following further proceedings were had in said cause, to wit:

Record Entry No. 3.—*Stipulation and Depositions Filed.*

VINCENT TERRY *vs.* MO. PAC. R'Y CO.

Now at this day comes the defendant, by its attorney, and files a stipulation and the depositions of J. R. Wade and J. W. Harrison.

9 And afterwards, to wit, on the 28th day of January, it being the 22nd day of this January term, 1881, the following further proceedings were had in said cause, to wit:

Record Entry No. 4.—*Amended Transcript fr. J. P.*

VINCENT TERRY *vs.* MO. PAC. R'Y CO.

Now at this day comes the parties hereto, by their respective attorneys, and J. W. Harrison, justice of the peace, before whom this

cause was tried, now appears in open court, and by permission of the court amends his transcript and the costs of the motion of the plaintiff to dismiss this cause; and also of the above amendment are taxed against defendant and execution hereby ordered to issue therefor, and the motion to dismiss is now withdrawn, and the affidavit of Henry Blackwell and a stipulation are now filed.

And afterwards, to wit, on the 5th of May, 1881, it being the 4th day of the May term, 1881, the following further proceeding- were had in said cause, to wit:

Record Entry No. 5.—Trial of Cause.

VINCENT TERRY *vs.* MO. PAC. R'Y CO.

Now, at this day come the parties hereto, by their respective attorneys, and this cause being ready for trial, the same is taken up and submitted by consent to a jury of six good and lawful men, citizens of the county of Pettis, to wit, J. P. Gorrell, Joseph Tice,
10 Joseph Rector, V. T. Chilton, H. H. Taylor, and J. O. Edwards, who are by the clerk of this court sworn according to law, and the evidence being closed, and the instructions of the court being given to the jury, and no argument being made, the jury now retire to their room to consider of their verdict, and now come the jury into open court and return the following verdict, to wit:

We, the jury, find the issues for the plaintiff, and assess his damages at three hundred and fifteen dollars.

V. T. CHILTON, *Foreman.*

And afterwards, to wit, on the 5th day of May, 1881, it being the sixth day of the May term, 1881, the following further proceedings were had in said cause, to wit:

Record Entry No. 6.—Motion to Double Damages.

VINCENT TERRY *vs.* MISSOURI PAC. R'Y CO.

Now, at this day comes the plaintiff, by his attorney, and files a motion to have the judgment entered in double the amount of the damages assessed herein.

And afterward, to wit, on the 7th day of May, 1881, it being the 6th day of the May term, 1881, the following further proceedings were had in said cause, to wit:

Record Entry No. 7.—Order to Double Damages.

11 VINCENT TERRY *vs.* MO. PAC. R'Y CO.

Now again come the parties, plaintiff and defendant, by their respective att'ys, and the motion heretofore filed to enter judgment in double the amount of damages, assessed by the jury in their verdict, is taken up, and the defendant thereupon files written objec-

tions to said motion being sustained, and the court being fully advised in the premises, the said motion is sustained, and it is now ordered and adjudged the damages assessed by the jury in their verdict, to wit, three hundred and fifteen dollars, be doubled; and it is further ordered and adjudged that the plaintiff have and recover of the defendant the sum of six hundred and thirty dollars, with 6 per cent. per annum interest thereon from this date, together with his costs in this behalf laid out and expended, and that execution issue therefor.

And afterwards, to wit, on the 7th day of May, 1881, it being the 6th day of the May term, 1881, the following further proceedings were had in said cause, to wit:

Record Entry No. 8.—Motion for a New Trial and in Arrest of Judgment.

VINCENT TERRY *vs.* MO. PAC. R'Y CO.

12 Now, at this day comes the defendant, by its attorney, and files its motion for a new trial, and also its motion in arrest of judgment.

And afterwards, to wit, on the 12th day of May, 1881, it being the 10th day of the May term, 1881, the following further proceedings were had in said cause, to wit:

Record Entry No. 9.—Motion for a New Trial and in Arrest of Judgment Overruled, and Bill of Exceptions Filed; also Affidavit and Appeal Bond.

VINCENT TERRY *vs.* MO. PAC. R'Y CO.

Now, at this day came the parties hereto, by their respective attorneys, and the motions for new trial and in arrest of judgment heretofore filed herein by defendant being now taken up and submitted to the court, and the court having seen and heard the same, and being fully advised in the premises, overrules said motion, to which action of the court in overruling said motions defendant then and there at the time duly excepted, and now comes the defendant, and presents its bill of exceptions to the court, which said bill of exceptions is by the court signed, filed, and allowed, and made a part of the record herein, and defendant files its affidavit for an appeal, and its appeal bond, which said bond is by the court approved, and an appeal herein allowed to the supreme court of this State.

13 Which bill of exceptions is in words and figures following, to wit:

Bill of Exceptions.

In the Circuit Court of Pettis County, Missouri.

VINCENT TERRY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILROAD COMPANY, Defendant.

Be it remembered that upon the trial of this cause on the 5th day of May, 1881, the following proceedings were had, viz:

The plaintiff, to sustain the issues upon his part, introduced Vincent Terry as a witness, who testified as follows, viz:

Testimony of V. Terry.

I live in Lamonte township, in Pettis county, Missouri. On or before the 3rd day of March, 1880, I owned some horses and mules. I kept them up in the night time always, and when I was not using them I let them run at large in the day time. On the morning of the 4th of March, 1880, I heard that some of my stock had been killed on the railroad. I went down there to where they were, and found four head killed near a culvert ¾ of a mile east of Lamonte. 3 of them were laying on the south side and one on the north side of the track. Three of them were killed dead, and one crippled so badly it could not get up, and the railroad hands killed it.

14 There were also 3 head of stock, the property of Adolphus Snoddy, lying dead at the same place. The stock were all badly mangled. The legs of some cut off, necks broken, backs broken, torn and bruised, and scattered along up and (down the) track, and having every appearance and indication from the mangled condition that they had been struck during the preceding night. Lying next to the town of Lamonte, on the north side of the railroad, is a pond lot containing about forty acres. This is usually covered to the extent of from ten to twenty acres with water, and is usually called the R. R. pond lot. Adjoining it on the east, and extending eastward next to the railroad track and right of way is an enclosed and cultivated field belonging to Mr. McConnell. On the south side of the railway track opposite the pond lot, and extending eastward along the railway right of way and track, is the enclosed and cultivated farm belonging to Mr. Price. The railway is fenced on the south side of the track where it runs through Price's farm and the farm lying east of it up to the town. The track is also fenced on the north side up to the pond lot where road runs through McConnell's farm and farm lying east of it. The pond lot was also fenced on three sides. The fence commenced at a cattle guard at the S. W. corner of the pond lot next to the town, and runs north to a

15 highway, thence along on the south side of the highway or public road and on the north side of pond lot until it reached the McConnell field, at northeast corner of pond lot; thence to McConnell's fence, and ran south between the two tracts to a point about 50 feet from the railway track at S. E. corner of pond lot; here the fence turned east and extended along the outer edge of the right of

way about 50 feet from center of track eastward some three miles, until it came to a public road crossing. The fence at the S. E. corner of pond lot was not connected with any cattle guards in the track. There were no guards there and no fence to prevent stock from passing from the pond lot upon the right of way lying north of railway and east of the pond lot. The pond lot was not fenced on the south at all, there being no fence between it and the track.

The fence around the pond lot had been in a bad fix for a long time before the accident. I saw it *done* two or three weeks before the accident. On the north side the fence was bad in several places. In the N. E. corner, at the place where the stock got in, it was only about knee high. I saw it in this condition about two weeks before my stock was killed; did not notice between that time and until after stock was killed. I saw the fence at the place my stock
16 (—) early the next morning after they were killed. I rode over to the place and my horse stepped over the fence. There were only two planks up, being the two lower ones. The down planks were there, and showed from the appearance that they had been there some time. There was no evidence of any recent break in them.

This was at the N. E. corner of town lot, where the fence joins to McConnell's.

The defendant has no building on the lot, but they have on the right of way adjoining a water tank and machinery for pumping, and they use it for obtaining water for the engines. It is connected with the pond by pipes. They had an ice house on it several years ago, but they have removed it, and have none there now. The defendant has always claimed to own the land, enclosed it, and exercised other acts of ownership over it.

The station agent at Lamonte and the pumper at the tank always looked after it and attended to it. They prevented people from getting water from the pond, and they made contracts in relation to cutting the grass on it. All the track not covered with water is in grass. The space in the grass between the water and McConnell's fence on the east is about 180 yards wide. My black mare was worth in the market in cash $125. She was 15½ hands high,
17 7 years old, gentle and kind, a good work animal. My wife wife drove her in the buggy. She was the family horse. She was a fine brood mare, and cheap at that price. The two older mules, killed at that time, were two years old; 1 horse and 1 mare mule, good size, sound, and worth in cash $75 each. The yearling mule killed was from the black mare, a good mule, worth $50 cash. The morning after the stock was killed I tracked the horses and mules from the gap in the N. E. corner of pond lot to where they were killed. The tracks were plain and easily distinguished. The place where the animals got on to the right of way and on to the track and where they were killed were all in Lamonte township, in Pettis county, Missouri.

Cross-examined by defendant's att'y:

The east line of Lamonte township is half a mile or more east of

where stock was killed. I owned the mare for a year before she was killed. I was not in the habit of letting my stock run out at night, and I don't know how they came to be out that night. The mare was not breachy; I knew that well. I had complaint made to me once about her being breachy, but I knew it was not true. She would stay inside of an enclosure 3 feet high for a week. When I went next morning after the stock was killed to examine the fence
18 I found the whole 16-foot pannel down except two planks. The animals had stepped over the two planks.

The appearance of the down planks indicated that the fence had not been recently broken down. The planks had been down some time.

Testimony of J. L. Fleming.

Plaintiff also introduced J. L. FLEMING, who testified:

I live in Lamonte, and during the year 1880 I cultivated a farm lying northeast of Lamonte, and had occasion and did pass by the pond lot and along the road on the north side of it every day. I knew the plaintiff's stock well. They were running around town. The last time I saw them they were lying dead on the R. R. track ¾ mile east of town on the morning after they were killed. I rode out to the N. E. corner of pond lot, from down town. A highway or street runs along paral-el with the north line of pond lot fence. I found the fence on the north side of pond lot down, and rode into the pond enclosure. My horse stepped over the fence and I rode on down to where the stock were. There was no fence between the pond lot and right of way. I entered at a place where the fence was down in N. E. corner. I saw tracks at the break. They passed through the break and on down the R. R. There was a small
19 draw running up to the gap from the direction of the pond, and the ground in it was wet and the tracks could be plainly seen. There was both mule and horse tracks. Fence was only two planks high; my horse stepped over it.

The broken pannel was the one next to McConnell's fence, right at N. E. corner of pond lot. The post- were standing and plank lying down on north side in the road. I had noticed the fence here several times before the accident, and saw the fence down. The top board was on the west 8 feet of the east pannel; on east half all off but the two lower boards—but middle boards.

I have seen some colored people living north of the — pass through, and I suppose they used it in passing through. The animals were all killed about a quarter and half a quarter of a mile east of southeast corner of pond lot. I think the water tank is in the corner of pond lot, in S. W. corner. There was no fence between pond lot and the track or right of way. The animals were all killed in Lamonte township. The town of Lamonte is in the N. W. corner of section 14. The pond lot is the N. E. ¼ of N. W. ¼ of section 14; the range line east between 22 and 23″, in the east boundary of the township.

I am familiar with the numbers of land in that vicinity.
20 The pond has been used extensively by the r'y company. They exercise all acts of ownership over it, through the station agent and pumper.

They prohibit people from using water there or make contracts about cutting the grass. I was one of the appraisers of the stock. I am a farmer, and trade in stock, and know the market value of such stock. I think the mare was worth $125.00; the two-year-old mules worth from $70 to $75 apiece, and the yearling about $50. I saw the stock about 7 or 8 o'clock in the morning, after they were killed. Four head were killed and three not quite dead then. The crippled ones were entirely helpless; their legs were broken, some back broken, some necks broken, all bruised and cut up, and one animal carried 100 yards east of the others.

Daniel McNair Testified.

The plaintiff also introduced DANIEL MCNAIR, who testified:

I live about 100 rods N. E. from N. E. corner of pond lot, and I passed along the road on the north side of it 4 or 5 times a day, and noticed the fence there particularly. I remember about the plaintiff's stock being killed. I went down to see them with Alie and George Terry. I found them lying along the track about
21 half a mile east of pond lot. They were a terrible wreck; legs, neck, and back broken, and otherwise greatly mangled and torn up. I followed the tracks of the animals from where they entered the pond lot to where they were killed.

The fence on north side of pond lot was down all but two planks. There was no fence between pond lot and right of way. I passed along there only the evening before the stock were killed, and it was then down, only two planks up, and those the two lower. It had been that way for several days. The west half of the pannel had the top plank up, but the two middle planks were gone. The east half of the pannel all the plank were gone except the two lower plank. It had been in this condition for two weeks. The balance of the fence was not in good condition. It had been repaired some from time to time, but was getting old and rotten all along on the north side. No highway crosses the r'y track between the town of Lamonte and a point 10 miles below where the stock was killed.

I noticed the condition of the fence particularly, because I knew the r'y company did not allow any stock in the pond enclosure.
22 I saw stock in there, and saw the fence down. I drove stock out of there myself only a little while before the stock was killed. The stock of Adolphus Snoddy was all lying dead about same place as plaintiff's, and all seemed to have been struck at same time.

Testimony of Shaw.

Plaintiff also introduced SHAW as a witness, who testified:

I live two miles east of Lamonte, in Dresden township, and one

and three-quarter miles east of N. E. corner of pond lot. The township line between Lamonte and Dresden township is a quarter of a mile west of my house. I knew the place where the stock all got in. I passed by there frequently, and saw the fence. It was in a bad fix all along on the north side. At N. E. corner the east half of pannel was all down two lower planks. West half of pannel had two middle planks on it. It was in this condition when I saw it a day or two before the stock was killed.

Deposition of Blackwell.

Plaintiff also read the deposition of Blackwell, as follows:

In the Circuit Court of Pettis County, Mo.

23 VINCENT TERRY, Pl'ff, *vs.* MO. PAC. R'Y CO., Def't.

ADOLPHUS SNODDY, Pl'ff, *vs.* MO. PAC. R'Y CO., Def't.

It is stipulated and agreed that the annexed affidavits of Henry Blackwell may be read in evidence upon the trial of these causes as the deposition and as though regularly taken and properly certified, subject only to objections as to competency and relevancy.

JNO. MONTGOMERY, JR.,
Att'y for Defendant.
WILLIAM L. FELIX,
Att'y for A. P. Snoddy.
GEO. P. B. JACKSON,
Att'y for V. Terry.

STATE OF MISSOURI, *County of Pettis:*

This affiant, Henry Blackwell, being duly sworn, on his oath deposes and says: I lived at Lamonte from about April, 1878, to May or June, 1880; during this time I was section foreman of the Mo. Pac. R'y Company. I know where the r'y pond is situated on the east side of Lamonte, Pettis county, Mo. This pond joins the
24 r'y track on the north side. There was no fence between the pond and r'y track during the time I lived at Lamonte. The pond is inclosed by a fence on the east, north, and west sides, and the r'y track was fenced on the south side opposite the pond. There was no cattle guard on the east side of the pond across the r'y track. The fence around the *the* pond on the east side did — extend up to the r'y track; it stopped about 50 feet north from the center of the track, where it connected with the r'y fence on the north side of the track, which runs parallel with the track and about 50 feet distant therefrom eastward for a distance of two or three miles before it is connected with a cattle guard under the track.

The pond track and right of way were in one enclosure, so that stock can't go from the pond track on the right of way eastward two or three miles. The last six months I was at Lamonte the fence around the pond track was in bad condition; the track contains about 40 acres, and about 20 acres was covered by water. The posts

around the pond lot were pretty rotten, and so decayed they would not hold nails well.

The stock of Vincent Terry and Adolphus Snoddy were killed about the third of March, 1880. About the first of March,
25 1880, the fence was down on the north side by the church, and I had my men drive the stock out of the pond track and notified the pumper, who had charge of the fence at the N. E. corner of the pond track, there was one or two planks knocked off of the top of the fence. At this time the fence around the pond track was in bad order, and cattle could get into the pond at several places. This was the condition of the fence at the time the stock was killed. The day before Terry's and Snoddy's stock was killed I drove stock out of this enclosure.

I notified the road-master of the condition of this fence about the middle of February, 1880. Right away after Terry and Snoddy's stock was killed the company repaired the fence around the pond track, and then began repairing the next morning after the stock was killed. Freight train 32 going east, about 10 o'clock p. m., killed the stock. The train was a little late that night. After the accident, the engineer of this train told me he killed the stock.

This conversation was three or four days after the accident.

It was my duty to report the fact of killing of stock to the company, which I did in this case.

Cross-examined:

I do not know where the stock got into the enclosure at;
26 my section embraced the line of road adjoining this pond. I passed over the track the same evening the stock was killed, about 6 o'clock p. m., and saw no stock in there then. It was not light enough for me to see stock more than 40 or 50 feet. I did not know whether the fence was repaired or not between the time I called attention of the pumper and the time the stock was killed.

I do not know how many planks high the fence was around the pond track. The place in the fence was in the northeast corner of the pond track, which I have spoken of as having one or two planks off, was on the north side and 6 or 8 pannels from the corner. I know there was one plank off, and maybe two; I am not certain. I do not remember how many were left on. I walked around the whole fence at the time I drove the stock out, about the 1st of March, 1880.

I went the next morning after the stock was killed to the N. E. corner, and there were still one or two planks off. I continued in the employ of the company after the accident until the 28th of May, 1880. I now live at Pine Bluff, Arkansas.

HENRY BLACKWELL.

Subscribed and sworn to before me, this 22 day of January, 1881. Comm. expires 2 | 14 '83.

W. L. FELIX, *N. P.*

27 This was all the evidence offered.

Plaintiff's Instructions.

The plaintiff then asked the court to instruct the jury as follows:

(Lost with other papers.)

Which instruction was given to the court as prayed, and against the objections of the def't; and to the action of the court in giving said instructions the defendant then and there excepted at the time.

Defendant's Instructions.

The defendant then asked the court to instruct the jury as follows, viz:

(Lost with other papers.)

Which instructions the court refused to give; and to the action of the court in refusing to give said instructions the defendant then and there at the time excepted.

28 Under the instructions the jury found for the plaintiff, and assessed his damages at $315.00. And on the 6th day of May, 1881, the plaintiff filed his motion to double verdict of the jury, which said motion was in words and figures following, viz:

Motion to Double Damages.

In the Circuit Court of Pettis County, Missouri. May Term, 1881.

VINCENT TERRY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now comes the plaintiff and moves the court to enter judgment in this case in double the amount of the damages assessed by the jury in their verdict, the same being by the jury assessed at three hundred and fifteen dollars, and plaintiff now moves and prays the court to enter the judgment in favor of plaintiff in the sum of six hundred and thirty dollars.

GEO. P. B. JACKSON,
Att'y for Pl'ff.

And on the 7th day of May, 1881, the defendant filed the written objections to said motion, which said objections were as follows, viz:

Objections to Motion to Double Damages.

29 In the Circuit Court of Pettis County, Missouri.

VINCENT TERRY *vs.* THE MO. PAC. R'Y CO.

The defendant objects to the sustaining of the motion in the cause to double the damages and verdict rendered by the jury herein, and to the entry of judgment for double the amount of such verdict, for the following reasons:

1. Because there is no evidence before the court authorizing such action.

2. Because this court has no jurisdiction of this cause.

3. Because the statute under which this action was brought, and under which is claimed the right to double the verdict rendered by the jury, is unconstitutional and so far void.

In that it is in conflict with and in violation of the Constitution of the United States, because it attempts to deprive defendant of its property, so far as the judgment rendered exceeds the verdict or damage awarded without due process of law.

JNO. MONTGOMERY, JR.,
Att'y for Def't.

30 And the court having heard the said objections, overruled the same and sustained the motion to double said damages, and entered judgment upon said verdict and motion for the sum of $630.00; and to the action of the court in overruling said written objection and sustaining said motion, and entering said judgment for said sum of $630.00, the defendant then and there excepted at the time.

And on the same day defendant filed its motion for a new trial, in words and figures as follows:

Motion for New Trial.

In the Circuit Court of Pettis County, Mo.

VINCENT TERRY *vs.* MISSOURI PAC. R'Y CO.

Defendant moves the court to set aside the verdict, and grant it a new trial for the following reasons, viz:

Because the court erred in giving for the plaintiff illegal and improper instructions against defendant's objections.

Because the court erred in refusing to give the jury legal and proper instructions asked by defendant.

JNO. MONTGOMERY, JR.,
Att'y for Defendant.

31 And the court have(ing) heard the same on [the] 12th day of May, 1881, overruled the same, to which action of the court the defendant then and there at the time excepted; and on the said 7th day of May, 1881, the defendant also filed its motion in arrest of judgment, which said motion was as follows:

Motion in Arrest of Judgment.

In the Circuit Court of Pettis County, Mo.

VINCENT TERRY
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

Defendant moves the court to arrest the judgment entered in this cause for the following reasons, viz:

Because the court has no jurisdiction to hear or determine this action.

Because the judgment is not warranted by the pleadings.

Because the court has now power or authority to enter the judgment for double the amount of the verdict for the reason that the statute providing for such proceedings is in violation of and in conflict with the Constitution of the United States, in seeking to deprive the defendant of its property, without due process of law.

JNO. MONTGOMERY, JR.,
Att'y for Defendant.

32 And the court having heard the same on the 12th day of May, 1881, overruled the same; and to the action of the court in overruling said motion the defendant then and there excepted at the time.

And the defendant now presents this its bill of exceptions, and prays that the same may be signed and sealed and made a part of the record in this cause, which is accordingly done, this 12th day of May, 1881.

J. P. STROTHER, *Judge.* [SEAL.]

And afterwards, to wit, on the 12th day of May, it being the 10th day of the May term, 1881, of this court, the following further proceedings were had in said cause, to wit:

Affidavit for Appeal and Bond.

VINCENT TERRY *vs.* THE MO. PAC. R'Y CO.

Now at this day come the parties hereto by their respective attorneys, and the motions for new trial and in arrest of judgment heretofore filed herein by defendant being now taken up and submitted to the court, and the court having seen and heard the same, and being fully advised in the premises, overrules said motion; to

33 which action of the court in overruling said motions defendant then and there at the time duly excepted. And now comes the defendant and presents his bill of exceptions to the court, which said bill of exceptions is by the court signed, filed, and allowed and made a part of the record herein, and defendant files its affidavit for an appeal and its appeal bond.

Which said bond is by the court approved and an appeal herein allowed to the supreme court of this State.

STATE OF MISSOURI, } *ss:*
County of Pettis, }

I, B. H. Ingram, clerk of the circuit court within and for the county and State aforesaid, hereby certify that the above and foregoing is a true, full, and complete transcript of the record and proceedings had in said court in the cause of Vincent Terry, plaintiff, against The Mo. Pac. R'y Company, defendant, as the same appears of record and on file in my office.

In testimony whereof, I have hereunto set my hand and caused the seal of said court to be hereto affixed. Done at office, in Sedalia, this 22nd day of March, A. D. 1882.

[SEAL.] B. H. INGRAM, *Clerk*,
By M. F. ATHY, *D. C.*

34 And afterwards, to wit, on the 29th day of May, A. D. 1882, the following further proceedings were had in said cause:

VINCENT TERRY, Resp., *vs.* THE MO. PAC. R'Y CO., App. } Appeal from Pettis County Circuit Court.

Now at this day comes the said respondent, by attorney, and files in this court a transcript of the record and proceedings of the said circuit court in this cause, and therewith a motion to affirm the judgment of the said circuit court rendered in said cause.

Five days to appellant to file in opposition to said motion.

Which said motion and affidavit in opposition thereto are, respectively, in the words and figures following, to wit:

In the Supreme Court of the State of Missouri. April Term, 1882.

VINCENT TERRY, Respondent,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Now on this day comes Vincent Terry, the above-named respondent, and produces in this court a transcript in the above-
35 entitled cause from the office of the clerk of the circuit court of Pettis county, and moves this court to affirm the judgment rendered in said cause by said circuit court, for the reason, as appears from said transcript at page 6, that final judgment was rendered in said cause at the May term, 1881, of said court, and on the 6th day of May, 1881, and as further appears from said transcript at pages 7 and 8, an appeal to the supreme court was allowed in said cause at said May term of said circuit court, and on the 12th day of May, 1881, the same being more than thirty days before the first day of the next October term of the supreme court, and to which term said appeal was returnable; and for the further reason that said appellant did not cause to be filed in the office of the clerk of the supreme court, at least fifteen days before said October term, 1881, to which said appeal was returnable, a transcript of the record and proceedings in said cause, as required by law.

Wherefore said respondent prays that the judgment of the circuit court of Pettis county be affirmed, as provided in section 3717 of the Revised Statutes of Missouri, and in Rule 22 of this court.

GEO. P. B. JACKSON,
Att'y for Respondent.
VINCENT TERRY.

36 On the back of said motion appear the following endorsements, to wit:

No. —. Vincent Terry *vs.* Mo. Pacific R'y Co., appellant. Motion to affirm judgment and notice to appellant. Filed May 29th, 1882. Henry W. Ewing, cl'k, by E. B. Ewing, D. C. Sustained June 26th, 1882.

Affidavit in Opposition to Motion.

STATE OF MISSOURI, *County of Pettis:*

This affiant, John Montgomery, Jr., being duly sworn, on his oath states:

I represented the defendant upon the trial in the circuit court of Pettis county, at May term, 1881, of Vincent Terry against Missouri Pacific Railway Company, and filed the bill of exceptions in the cause during that term, as I remember it. At the same term we tried the case of Snoddy *vs.* the same defendant, and the same facts were shown in each case, but in the Snoddy case the motion
37 for a new trial was continued to the September term to give me time to get up the bill of exceptions.

In the vacation between the May and September terms, Mr. Felix, who was Snoddy's attorney, and myself undertook to get up the bill of exceptions in that case, and we could not find the original papers in the clerk's office of either of the said cases.

I myself went more than once, and enquired more than once for them, but they were not to be found. I felt confident that during these searches I had directed Mr. Ingram to prepare the transcript for the supreme court for the appellant, and my recollection now is that I had so ordered it, and it could not be prepared, owing to the loss of the papers, particularly the bill of exceptions. Felix & I had very imperfect notes of the evidence, which was the same in the Terry & in the Snoddy cases, and we expected to copy the evidence for the Snoddy case from the bill of exceptions in the Terry case, but we never could find it, and my recollection is that we finally prepared it just before the September term, without ever being able to find the bill of exceptions in the Terry case.

I frequently saw Mr. Ingram, the clerk, when these missing papers & the transcript were talked about, & I think he finally found
38 some of them—probably the bill of exceptions—& I told him to go on and send up what he could.

This order, however, was made since the January term, 1882—I mean the final order to send up such as he had found.

JNO. MONTGOMERY, JR.

Subscribed & sworn to, before me, the 27th day of May, 1882.

R. C. SNEED, *N. P.*

My com. expires Aug. 4, 1885.

On the back of said affidavit appear the following endorsements, to wit:

Vincent Terry, resp., *vs.* Mo. Pac. R'y Co. Affidavit in opposition

to motion to affirm. Filed June 1, 1882. Henry W. Ewing, cl'k, by E. B. Ewing, D. C.

And afterwards, to wit, on the 26th day of June, the following further proceedings were had in said cause:

39 VINCENT TERRY, Respondent,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Appeal from Pettis County Circuit Court.

Now at this day it appearing to the court here that the said appellant prayed the appeal herein, and that the same was granted more than thirty days before the commencement of the present term of this court, and that the said appellant has failed to file a transcript of the record and proceedings of the said Pettis county circuit court herein fifteen days before the first day of the present term, or otherwise prosecute its said appeal as required by law, and the said appellant not appearing or showing good cause for such delay, it is, therefore, considered and adjudged by the court that the judgment aforesaid, in form aforesaid, by the said Pettis county circuit court rendered, be in all things affirmed, and stand in full force and effect. And it is further considered and adjudged by the court that the said respondent recover against the said appellant his costs and charges herein expended, and have therefor execution.

40 And afterwards, to wit, on the 12th day of July, 1882, an appeal bond was filed in the above-entitled cause, in words and figures as follows, to wit:

Know all men by these presents, that we, The Missouri Pacific Railway Company, as principal, and W. Nichols and J. W. Larimore, as sureties, are held and firmly bound unto Vincent Terry in the full and just sum of two thousand dollars, to be paid to the said Vincent Terry, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this thirteenth day of June, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately, at the April term of the supreme court of the State of Missouri, in a suit depending in said court between Vincent Terry, plaintiff, and The Missouri Pacific Railway Company, defendants, judgment was rendered against The Missouri Pacific Railway Company, and the said The Missouri Pacific Railway Company having obtained a writ of error of the said Supreme Court of the
41 United States to reverse the judgment in the aforesaid suit, and a citation directed to the said Vincent Terry, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said

The Missouri Pacific Railway Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

THE MISSOURI PACIFIC RAILWAY COMPANY, [SEAL.]
By R. S. HAYES, [SEAL.]
Senior Vice President.
W. NICHOLS. [SEAL.]
J. W. LARIMORE. [SEAL.]

Approved by—
T. A. SHERWOOD,
C. J. S. C. Mo.

On the back of said bond appears the following endorsement, to wit:

42 No. —. Supreme court of Missouri. Vincent Terry, resp., *vs.* The Missouri Pacific Railway Company, app. Bond, $2,000.00. The Missouri Pac. R'y Co., principal; W. Nichols and J. W. Larimore, sureties. Filed 12th day of July, 1882. Henry W. Ewing, cl'k, by E. B. Ewing, D. C.

STATE OF MISSOURI, *ss:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings had in the above-entitled cause, as fully as the same remain of record and on file in my office.

In testimony whereof, I hereto set my hand and affix the seal of said court, at office, in the city of Jefferson, this 25th day of September, A. D. 1882.

[SEAL.]

HENRY W. EWING, *Cl'k,*
By E. B. EWING, *D. C.*

Endorsed on cover: Missouri sup. court. No. 323. The Missouri Pacific Railway Company, plaintiff in error, *vs.* Vincent Terry. Filed 7th October, 1882.

IN THE SUPREME COURT OF THE UNITED STATES.

VINCENT TERRY, Defendant in Error,
vs.
THE MO. PAC. R'Y CO., Plaintiff in Error. } No. 57.

It is hereby stipulated and agreed between the parties to the above-entitled cause that the record on file in the office of the clerk of the Supreme Court of the United States, as printed, by said clerk, is defective in that it omits certain affidavits filed by the defendant in error herein — said cause in the supreme court of the State of Missouri. And it is further stipulated that proceedings by *certiorari* to pecfect such record are waived, and that copies of said affidavits, certified by the clerk of the supreme court of the State of Missouri and hereto attached, are true and correct and supply the omissions in the record in this cause before mentioned, and that the same may be as though properly returned and certified in the transcript of said cause to this court, and that said record shall be perfected by the addition and use of said affidavits hereto attached. And for all purposes said affidavits may be referred to and shall be considered as the same fact as though properly returned and certified in the said transcript.

A. T. BRITTON,
A. B. BROWNE,
Att'ys for Plaintiff in Error.
G. G. VEST,
Att'y for Defendant in Error.

STATE OF MISSOURI, } *ss:*
County of Pettis, }

George P. B. Jackson, being duly sworn on his oath, states that he is the attorney of Vincent Terry in a case entitled Vincent Terry against The Mo. Pacific Railway Company, which was tried in the Pettis circuit court at its May term, 1881, and judgment rendered therein in favor of said Terry *vs.* said R. R. Co.

That said case was originally instituted before J. W. Harrison, a justice of the peace in Lamonte township, in Pettis county, where said Terry recovered judgment, and said R. R. Co. appealed to the Pettis circuit court.

That said Terry filed in said justice court a statement fully setting forth that certain horses and mules belonging to Terry (and ful y described and their value stated in said statement) had been run over and killed by the engine and cars of defendant in said Lamonte township; that said stock got upon defendant's railroad track and were killed at a point in said Lamonte township where said railroad ran and passed through enclosed fields and cultivated farms, and not at any road crossing, nor within any town or city, nor within any switch limits, and that at said point where said stock had en-

tered upon defendant's right of way and were killed the defendant had failed to maintain fences as required by law.

That upon the filing of said statement said justice issued a summons setting forth the nature of plaintiff's cause of action, and commanding defendant to appear on a day therein named, which summons was served by the constable of said township upon the station agent of defendant in said township.

That defendant failed to appear in said justice court, and judgment was rendered by default, and afterwards defendant filed a motion to set aside the judgment of the justice, which being overruled the defendant appealed to the circuit court, as before stated; and thereupon the said justice duly certified to the circuit court all the original papers and a transcript of all his docket entries and proceedings in said cause, and all of which were duly received and filed in the office of the clerk of said Pettis circuit court, and at the May term, 1881, thereof said cause was tried in said circuit court, at which trial all of the said original papers and said transcript were present and were used on said trial.

That on said trial plaintiff again recovered judgment, and defendant, having unsuccessfully moved for a new trial and in arrest, filed a bill of exceptions, and an appeal was granted at said May term, 1881, to the supreme court of Missouri, which said appeal was returnable to the October term, 1881, of said supreme court.

That this affiant made enquiry at the clerk's office of said circuit court, and was informed that no transcript was ordered by said appellant in time for said October term of the supreme court.

That about the first of February, 1882, said appellant did order a transcript in said case, returnable to the supreme court at its April term, 1882, being the second term of said court after said appeal was granted.

This affiant further states that in the latter part of August or the first part of September, 1881, he, as att'y for said Vincent Terry, was examining and preparing for submission in the supreme court another case between the same parties, and also entitled Vincent Terry *vs.* The Mo. Pacific R'y Co., and which was set for hearing at the October term, 1881, of the supreme court, and submitted in Jan., 1882.

That at said time in August or September last he found among the papers of said former case some of the papers belonging to the second case between these parties; that he then separated them and then examined and found that all the papers belonging to said second case were then together; that he then called the attention of B. H. Ingram, clerk of the Pettis circuit court, to the fact that the papers in the two cases had been mingled together, and that this affiant had separated them, and the said clerk then examined and found that all the papers in said second case were then together, and he marked them and deposited them altogether in his said office.

Affiant further states that at the May term, 1881, there was also pending in the Pettis circuit court another case, entitled A. P. Snoddy *vs.* The Mo. Pacific R'y Co., growing out of the same matters as the second case of Terry *v.* Mo. P. R'y Co., the same train of defendants

having killed stock belonging to Terry and Snoddy; that it was agreed between the att'ys for said Snoddy and the r'y co. that the evidence introduced in the Terry case should apply to the Snoddy case, except as to ownership and value of stock, and that the bill of exceptions in the Snoddy case should be made up from the bill of exceptions in the Terry case; that the bill of exceptions was filed in the Terry case at the May term, 1881, and that at said term motions for new trial and in arrest were filed in the Snoddy case, but not acted upon, nor was any bill of exceptions filed in said case at said May term; that at the September —, 1881, a bill of exceptions was filed in said Snoddy case, and which was substantially the same as the bill of exceptions in the Terry case. This affiant is unable to state whether or not the bill of exceptions in the Snoddy case was actually copied or made up from the one in the Terry case, or whether the defendant r'y co. or its att'ys had in their possession the papers in the Terry case, but he does state positively that a very short time previous to the filing of the bill of exceptions in the Snoddy case all the papers in the Terry case were in the clerk's office, and that after that time a portion of the papers in the Terry case were missing and have never been found; that the said papers which are missing are the transcript and original papers certified by the justice of the peace and the instructions in the case, and that the only papers in said case which can now be found are a deposition of one Blackwell, formerly an employe of defendant, defendant's motion for new trial and motion in arrest, a motion to render judgment for double damages and written objections thereto, the bill of exceptions, and defendant's affidavit and bond for appeal; that the only papers remaining are those essential to defendant's appeal, and that all the papers material to plaintiff's cause of action are missing.

This affiant further states that he has never seen any of said missing papers since the time he saw them in the custody of the clerk of the Pettis circuit court, a short time prior to the filing of the bill of exceptions in the said Snoddy case, at the September term, 1881, and that he does not know where any of said papers now are or have been since said time.

That if the defendant appellant had ordered the transcript in said case in time for the October term, 1881, of the Supreme Court, to which said appeal was returnable, the whole and complete record could have been sent to the Supreme Court.

That no transcript was ordered until after the time had expired when the same should have been filed in the office of the clerk of the Supreme Court, nor until after said papers were lost.

That by reason of the premises it is impossible to include in the transcript made by the clerk that portion of the original papers lost or missing as aforesaid, but that the transcript as made out shows a final judgment for plaintiff rendered at May term, 1881, and appeal therefrom at the same term.

GEO. P. JACKSON.

Subscribed and sworn to before me, this 26th day of May, 1882.

[SEAL.] B. H. INGRAM, *Clerk*,
By M. F. ATHY, *D. C.*

STATE OF MISSOURI, } ss:
County of Pettis, }

B. H. INGRAM, being duly sworn on his oath, states that he is the clerk of the circuit court of Pettis county, Mo., and has been such clerk for more than two years last past.

That at the May term, 1881, of said court a judgment was rendered in favor of the plaintiff in the case of Vincent Terry *vs.* The Mo. Pacific R'y Co., and an appeal was granted at said May term from said judgment, returnable to the October term, 1881, of the Supreme Court.

That no transcript was ordered by the defendant appellant in said case in time for said October term.

That the first time any order was given for a transcript in said case was about the first or second day of February, 1882, when the same was made out and certified to the Supreme Court in time for its April term, 1882.

That when said order was given for said transcript a part of the original papers in said case were missing and cannot now be found.

That the papers missing consist of the transcript and original papers certified to the circuit court by J. W. Harrison, justice of the peace of Lamonte township, in Pettis county, and the instructions given at the trial in the circuit court.

That about the last of August or the first of September, 1881, his attention was called to the papers in the case by Geo. P. B. Jackson, the att'y of Vincent Terry, and he then examined them and saw that all the papers belonging to said case were together, and he then marked them and put them away altogether in his office.

That he has never seen or been able to find said missing papers since the filing of the bill of exceptions in a similar case, entitled A. P. Snoddy *vs.* The Mo. Pacific R'y Co., and which bill of exceptions was filed in said case at the September term, 1881, of said Pettis circuit court.

That he has no knowledge or information as to when, nor in what manner, nor by whom said papers were taken from his office or from the other papers in the case, nor does he know where they are or have been since he last saw them.

That by reason of the premises he has been unable to include in the transcript made by him the said portion of said papers so missing as before stated.

That if a transcript had been ordered in time for the October term of the Supreme Court he could have made a transcript containing all of the original papers in said cause, and that no transcript was ordered until after said papers were lost, nor until too late to be returned to the October term, 1881, of the Supreme Court.

B. H. INGRAM,
Circuit Clerk.

Subscribed and sworn to before me, this 26th day of May, 1882.

[SEAL.] C. L. JACKSON,
Notary Public.

I, Henry W. Ewing, clerk of the supreme court of Missouri, do hereby certify the above and foregoing to be a full, true, and complete copy of the affidavits of G. P. B. Jackson and B. H. Ingram, filed in the case of Vincent Terry *vs.* Mo. Pacific R'y Co., on May 29th, 1882.

In testimony whereof I have hereunto set my hand and affixed the seal of said court. Done at office in the city of Jefferson, this 3rd day of September, A. D. 1885.

[Seal of the Supreme Court of Missouri.]

HENRY W. EWING, *Clerk.*

[Endorsed on back:] Supreme Court U. S. 1885. Oc'b'r term. No. 57. The Missouri Pacific Railway Co., pl'ff in error, *vs.* Vincent Terry. Stipulation of counsel and addition to record. Office Supreme Court U. S. Filed Nov. 4, 1885. James H. McKenney, clerk.

Office Supreme Court U. S.
FILED
NOV 4 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1885.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
VINCENT TERRY.
No. 57.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
PETER HUMES.
No. 593.

In Error to the Supreme Court of the State of Missouri.

BRIEF FOR PLAINTIFF IN ERROR.

Attorneys:
A. T. BRITTON,
A. B. BROWNE.

THOS. J. PORTIS,
of Counsel.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1885.

Supreme Court of the United States.

OCTOBER TERM, 1885.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

v.

VINCENT TERRY.

No. 57.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

v.

PETER HUMES.

No. 593.

In Error to the Supreme Court of the State of Missouri.

STATEMENT.

By an order of the Court entered January 5, 1885, these cases are set down to be heard together because involving the same questions.

The actions are based on sec. 43 of the general incorporation laws of the State relating to railroads, (Wag-

ner's Statutes, vol. 1, p. 310,) as amended by the act of Feb'y 18, 1875, (Session Laws 1875, p. 131,) which provides:

"Every railroad corporation formed or to be formed in "this State, and every corporation formed or to be formed "under this chapter, or any railroad corporation running "or operating any railroad in this State, shall erect "and maintain lawful fences on the sides of the road "where the same passes through, along, or adjoining in- "closed or cultivated fields or uninclosed lands, with open- "ings and gates therein to be hung, and have latches or "hooks, so that they may be easily opened and shut at all "necessary farm crossings of the road for the use of the "proprietors or owners of the lands adjoining such rail- "road, and also to construct and maintain cattle guards, "where fences are required, sufficient to prevent horses, "cattle, mules, and all other animals from getting on the "railroad; and until fences, openings, gates, and farm "crossings, and cattle guards as aforesaid, shall be "made and maintained, such corporation shall be liable "*in double the amount of all damages* which shall be done "by its agents, engines, or cars to horses, cattle, mules, or "other animals on said road, or by reason of any horses, "cattle, mules, or other animals escaping from or coming "upon said lands, fields, or inclosures, occasioned in either "case by the failure to construct or maintain such fences "or cattle guards. After such fences, gates, farm cross- "ings, and cattle guards shall be duly made and main- "tained, said corporation shall not be liable for any such "damages, unless negligently or wilfully done."

The Humes case is an action commenced Sept. 6, 1877, in the Circuit Court of the City of St. Louis. The petition therein avers the failure of the plaintiff in error to construct and maintain the fences, gates, &c., as required by above statute, by reason whereof a mule owned by plaintiff, and valued at $135, was run over and killed by the de-

fendant's agents, engines, and cars, on said railroad, and concludes:

"Plaintiff states that by reason of the premises he is "damaged in the sum of $135, wherefore he prays judg- "ment for the sum of two hundred and seventy dollars "and costs."

Rec., 2–3.

The case was tried without a jury, and as the judgment recites—

"the Court, having heard the same, and being fully ad- "vised thereof, finds the issues herein joined between the "parties herein in favor of the plaintiff, and assesses his "damages at the sum of one hundred and thirty-five "dollars; and thereupon, on motion of plaintiff by "attorney, it is ordered by the Court that said damages "assessed as aforesaid be doubled, and that judgment "herein be rendered in favor of the plaintiff for the sum "of two hundred and seventy dollars.

"Therefore it is considered by the Court that the "plaintiff recover of the defendant the sum of two hundred "and seventy dollars, being double the amount of damages "aforesaid, as assessed, together with his costs and charges "herein expended, and have execution therefor."

Rec., 4.

Such judgment was rendered over the objection (*inter alia*) of the defendant that the statute under which the action was brought is in conflict with—

"Sec. 1, Art. 14, of the Constitution of the United States, "in that it is depriving the defendant of its property so "far as it exceeds the value of the stock killed or injured, "without due process of law, and in that it denies to the "defendant the equal protection of the laws."

And the further objection that the statute is in conflict with certain provisions of the State constitution.

Rec., 8.

Motions for new trial and in arrest of judgment were made and overruled.

Rec., 9–11.

The case was then carried to the St. Louis Court of Appeals, where, on stipulation, the judgment below was *pro forma* affirmed.

Rec., 11–12.

On appeal to the Supreme Court of the State, the judgment was affirmed and an elaborate opinion rendered.

Rec., 14–21.

The Terry case is apparently an action commenced before a Justice Court to recover the value of certain stock killed upon the railroad of plaintiff in error, and by its agents, engines, and cars. The case was carried by appeal to the Circuit Court of Pettis County, Missouri, where trial was had and verdict rendered for plaintiff, the damage being assessed thereby at $315.

Thereupon the plaintiff moved "to have the judgment "entered in double the amount of the damages assessed "herein."

Rec., 4, 12.

Whereto the defendant filed objections based on the insufficiency of the evidence, want of jurisdiction, and that the statute under which the action was brought is in conflict with the Federal Constitution, "because it attempts to "deprive defendant of its property, so far as the judgment

" rendered exceeds the verdict or damage awarded, without " due process of law."

Rec., 13.

These objections were overruled, the motion sustained, and the Court—

"ordered and adjudged the damages assessed by " the jury in their verdict, to wit, three hundred and " fifteen dollars, be doubled, and it is further ordered and " adjudged that the plaintiff have and recover of the de- " fendant the sum of six hundred and thirty dollars, " with 6 per cent. per annum interest thereon from this " date, together with his costs in this behalf laid out and " expended, and that execution issue therefor." * *

Rec., 4–5.

Motions for new trial, and in arrest of judgment being made and overruled.

Rec., 13–14.

Appeal was taken to the Supreme Court of the State, where the judgment below was affirmed.

Rec., 15–17.

ASSIGNMENT OF ERRORS.

The Court below erred—

1st. In holding the statute in question not in conflict with the Federal Constitution.

2d. In giving defendants in error judgment for double the amount of their damage.

ARGUMENT.

The errors above assigned cover the sole question reviewable here, viz: Does this statute contravene the fundamental law?

We insist the statute is repugnant—

1. To Article 5, of the Amendments to the Constitution, which provides that no person shall "be deprived of life, "liberty, or property, without due process of law;" and—

2. To Sec. 1, of Article 14, which provides that "no State "shall make or enforce any law which shall abridge the "privileges or immunities of citizens of the United Staes; "nor shall any State deprive any person of life, liberty, "or property without due process of law; nor deny to "any person within its jurisdiction the equal protection "of the laws."

Article 5 is a direct guarantee of right. Article 14 is a direct prohibition against its invasion. To bring this plaintiff in error within the right guaranteed is to bring this statute within the prohibition declared.

I.

ON WHOM DOES THE STATUTE OPERATE?

The language thereof furnishes the sufficient answer, viz:

"Every railroad corporation formed or to be formed in "this State, and every corporation formed or to be formed "under this chapter, or any railroad corporation running "or operating any railroad in this State."

Railroad corporations therefore—and such corporations alone—are the sole parties affected thereby. Whatever obligation, penalty, or damage the statute may inflict operates solely on one class.

Is this class, railroad corporations, within the protection of the Constitution? Are they "persons" within the meaning of the term as used therein who cannot "be

" deprived of life, liberty, or property without due process " of law," and who are entitled to " the equal protection " of the laws " ?

The decisions of this Court furnish the abundant answer.

In the *Railroad Tax case* (8 Saw., 265) Mr. Justice Field said:

" It would be a most singular result if a constitutional " provision intended for the protection of every person " against partial and discriminating legislation by the " States should cease to exert such protection the moment " the person becomes a member of a corporation. We " cannot accept such a conclusion. On the contrary, we " think that it is well established by numerous adjudica- " tions of the Supreme Court of the United States, and of " the several States, that whenever a provision of the Con- " stitution, or of a law, guarantees to persons the enjoy- " ment of property, or affords to them means for its pro- " tection, or prohibits legislation injuriously affecting it, " the benefits of the provision extend to corporations, and " that the Courts will always look beyond the name of the " artificial being to the individuals whom it represents."

Thus the Constitution declares that the judicial power of the United States shall extend to " controversies between " citizens of different States." In *The Bank of the United States* v. *Deveaux*, (5 Cranch, 86,) the question was whether corporations were " citizens " within the meaning of this provision. It was held they were, the Court observing:

" Repeatedly has this Court decided causes between a " corporation and an individual without feeling a doubt re- " specting its jurisdiction."

In *Society*, &c., v. *New Haven*, (8 Wheat., 864,) the question arose whether corporations were within the descrip-

tion of " person or persons " contained in the treaty of peace with Great Britain, whose rights of property were thereby preserved. It was held they were, the Court observing:

" We can discover no sound reason why a corporation ex-
" isting in England may not as well hold real property in
" the United States, as ordinary trustees for charitable or
" other purposes, or as natural persons for their own use."

In *Marshall* v. *Baltimore & Ohio R.R. Co.*, (16 How., 314,) the rule in *Bank of U. S.* v. *Deveaux, supra*, was reaffirmed in favor of the right of an individual to sue in the Federal courts a corporation organized and existing under the laws of another State.

In *Sinking Fund cases*, (99 U. S., 718,) this Court said:

" The United States cannot, any more than a State, in-
" terfere with private rights except for legitimate govern-
" mental purposes. They are not included within the con-
" stitutional prohibition which prevents States from pass-
" ing laws impairing the obligation of contracts; but,
" equally with the States, *they are prohibited from depriv-*
" *ing persons or corporations of property without due pro-*
" *cess of law.*"

As, then, corporations are " citizens " for the purposes of suing and being sued, they are necessarily " persons " for the purpose of invoking the protection of the Constitution upon their property rights therein. If they can be denied " the equal protection of the laws " they stand at the mercy of the individual to whom such " equal protection " is guaranteed. To the corporation the will of the legislature would thus become the supreme law, wherefrom no appeal lies. To the individual such legislative will is subordinated to the fundamental law, and at his call the judicial power may intervene to restrain any attempted encroachment by

the one upon the domain of the other. Thereby his rights are enforced and protected.

The statute, then, applies to a single class of persons. That class is within the constitutional protection.

II.

WHAT DUTIES AND LIABILITIES DOES THE STATUTE IMPOSE?

a. Duties.

The class of persons named by the statute—railroad corporations—

" shall erect and maintain lawful fences on the sides of the " road where the same passes through, along, or adjoining " inclosed or cultivated fields, or uninclosed lands—"

with suitable gates of easy operation at crossings—

" and also to construct and maintain cattle guards, where " fences are required, sufficient to prevent horses, cattle, " mules, and all other animals from getting on the rail- " road."

b. Liabilities.

" and until fences, openings, gates, and farm crossings and " cattle guards as aforesaid shall be made and maintained, " such corporation shall be liable

(1,) " in double the amount of all damages which shall " be done by its agents, engines, or cars, to horses, cattle, " mules, or other animals on said road, or

(2.) " by reason of any horses, cattle, mules, or other ani- " mals escaping from or coming upon said lands, fields, or " inclosures, occasioned in either case by the failure to " construct or maintain such fences or cattle guards."

The liability is thus two-fold.

1st. For all damage done by the corporation direct, through its agents, engines, or cars, in the killing or injury of stock and

2d. For all damages suffered to be done by stock to third persons by its failure to "construct or maintain "such fences or cattle guards."

In both cases double the amount of damages are to be recovered by the injured party.

The power of the State to impose the duties enjoined by this statute is not questioned. Its power to inflict double damage therefor, and hand over to the injured party that which represents double the amount of his injury, is directly challenged because depriving the corporation of its property without "due process of law," and denying to it the "equal protection of the laws."

In the decision of the Humes case the Supreme Court of the State discuss at length the effect of the State constitution upon this statute, and hold the act not repugnant thereto. With that discussion we have no concern here. In holding the statute likewise not repugnant to the Federal Constitution, the Court bases its conclusion upon the authority of *Spealman* v. *R.R.*, (71 Mo., 434,) which holds—

"that the enactment in question being an exercise of the "police power of the State was valid, and in no sense ob-"noxious to the provision declaring that no person shall "be deprived of life, liberty, or property without due "process of law."

And therefore not violative of the 5th nor the 14th Articles of the Amendments to the Constitution of the United States.

In *Barnett* v. *A. & P. R.R.*, (68 Mo., 56,) the statute is declared a penal one upon the authority of—

Gorman v. *Pacific R.R.*, 26 Mo., 450.
Trice v. *Hann. & St. Joe R.R.*, 49 *Ib.*, 440.
Seaton v. *C. R. I. & P. R.R.*, 55 *Ib.*, 416.
Parish v. *M. K. & T. R W.*, 63 *Ib.*, 286.

And the Court adds:

"The act in question was chiefly intended for the protection of persons who are transported in railway carriages, and similar enactments have repeatedly been held to be a proper exercise of the police power of the State. * * *

"Being a penal statute, in the absence of any constitutional restriction, the legislature may lawfully make such disposition of the penalty imposed by it as will, in its discretion, best subserve the purpose of the enactment. Instead of giving the whole of the penalty to the State or County or dividing the penalty and providing for a *qui tam* action, the whole of the penalty is given to the party aggrieved, and the method adopted is doubtless the most efficient one for enforcing the statute."

Accepting the definition of the act as thus given, and it by no means follows that, considered either as a penal statute or an exercise of police power, the penalty affixed thereto and the mode of its enforcement is a lawful exercise of legislative power.

The police power of the State is defined by Chief-Justice Shaw, in *Commonwealth* v. *Alger*, (7 Cush., 84,) as—

"the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, *not repugnant to the Constitution*, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."

Judge Cooley, in his work on Constitutional Limitations, (p. 572,) observes:

"The police of a State, in a comprehensive sense, em-
" braces its system of internal regulation, by which it is
" sought not only to preserve the public order and pre-
" vent offences against the State, but also to establish for
" the intercourse of citizen with citizen those rules of good
" manners and good neighborhood which are calculated
" to prevent a conflict of rights and to insure to each the
" uninterrupted enjoyment of his own, *so far as is reason-*
" *ably consistent with a like enjoyment of rights by others.*"

But the limitation of such power is clearly defined by the same learned writer at p. 575. thus:

"If the power only extends to a regulation of rights
" with a view to the due protection and enjoyment of all
" *without depriving any one of that which is justly and*
" *properly his own*, then its possession and exercise by the
" State, in respect to the persons and property of its citi-
" zens, cannot well afford a basis for an appeal to the pro-
" tection of the National authorities."

Herein lies the pivotal point of the case. Within whatever class of legislation this statute may fall, declarative, remedial, penal, or otherwise, the limitation of power is always present. "Due process of law" and "equal pro-
" tection of the laws" are terms unrestricted in their application by mere choice of language. By its terms a statute may be of the one class, whilst its practical operation and effect may bring it within another. The constitutional prohibition must therefore operate equally upon all legislation falling within its scope, unrestricted by mere matters of form. That which is within the spirit of the law may be interdicted, whilst its letter may be free therefrom.

In so far as this statute imposes duties upon the rail-

road company, it may be conceded as a proper exercise of police power. The Court below declares in *Barrett* v. *A. & P. R.R.*, *supra*, that "similar enactments have repeatedly been held to be a proper exercise of the police "power of the State."

With the broad declaration thus made we take direct issue.

Similar enactments imposing similar *duties*, in almost similar language, have been upheld—where the *statute gives the injured party the actual amount of his damage only.*

Such was the law in Vermont when in *Thorpe* v. *R.R.*, (27 *Vt.*, 140,) the question was raised whether the statute could operate upon railroad companies incorporated previously thereto and without such condition imposed by their charter. The statute was upheld by the Court as a proper exercise of police power applicable to all railroad corporations.

The law of 1848, in New York, gave *actual damages* only, under a statute otherwise similar in terms to that here under discussion. The question arose whether railroads were liable thereunder when contributory negligence by the owner was proven.

The Court affirmed such liability.

Suydam v. *More.*, 8 Barb., 358.
Waldron v. *RR.*, *Ib.* 390.
Corwin v. *RR.*, 13 N. Y., 42.

In *Miller* v. *RR.*, (21 Barb., 513,) the plaintiffs contended that the defendant was bound to construct over and across its railroad without compensation a part of a highway recently laid out, pursuant to a certain act passed after the incorporation of the defendant, but the Court held :

" The power reserved to the legislature to alter, modify, " or repeal the defendant's charter, did not purport to au- " thorize the assumption of their property without com- " pensation. No power to do that could have been re- " served, for none such could have existed. It would be " preposterous to say that the legislature has the power " to make any and every requisition upon the defendants " as a condition of their retaining their corporate existence. " *To require them, for instance, to make donations to the* " *towns through which their railroad may pass, or to any* " *other body politic, or to individuals.*"

Yet this " double damage " act of the State of Missouri does require the railroad to make a " donation * * * to in- " dividuals." The form of the judgments herein forcibly illustrate the point. The *actual* damage to the plaintiff is *expressly* found and stated, and judgment in double the amount thereof is given.

Is that not taking the private property of one and donating it by law to the use and enjoyment of another without compensation? Does it not deprive this corporation of its property without due process of law, and deny to it the equal protection of the laws? In *Cole* v. *La Grange*, (113 *U. S.*, p. 7,) this Court said:

" The express provisions of the constitution of Missouri " tend to the same conclusion. It begins with a declara- " tion of rights, the 16th article of which declares that no " private property ought to be taken or applied to public " use without just compensation. This clearly presupposes " that private property cannot be taken for private use. " (St. Louis County Court *v.* Griswold, 58 Missouri, 175, " 193; 2 Kent Com., 339, Note 349.) Otherwise, as it " makes no provision for compensation except when the " use is public, it would permit private property to be " taken or appropriated for private use without any com- " pensation."

The same provision is present in the Federal Constitution (Article 5 Amendments,) and by force of natural reasoning must have the same construction.

In *Wurts* v. *Hoagland*, (114 *U. S*, 606,) it was held that certain acts of the State of New Jersey for the draining and reclamation of marsh lands were not within the prohibition of the constitution. Those acts authorized the work to be done on application of a prescribed number of owners of separate tracts within the general tract to be reclaimed, and provided that the cost should be assessed upon all owners therein, their lands to be sold on default in payment, previous notice of the proceeding being required and opportunity for hearing given.

The Court therein expressly plant such statutes upon the general police power of the State.

But suppose the acts in question had permitted the work to be done at the expense of the willing owners, and given them a right of action against all owners who failed or refused to join to recover *double* the cost thereof. Such an act would be in the exercise of the police power of the State. The injury to the parties acting would be simply the amount advanced for the owner or owners who failed to contribute. Could they lawfully recover *double* the amount of their injury?

It is no answer hereto to say that as against railroad corporations the act is for the protection of the travelling public. Upon the same ground, and in the exercise of police power, the State may deem marsh land injurious to public health, and legislate as suggested for its reclamation. Both acts would stand upon the same ground.

The failure to reclaim, in the one case, if so required, and the failure to fence in the other, would not involve any *criminal* liability. Neither acts involve any degree of moral turpitude. They are neither *mala prohibitum* nor

mala in se. Many duties are imposed by law for the common comfort, health, and convenience, which, if omitted, create a civil obligation only and not a criminal liability.

The case at bar will furnish an apt illustration. Failure to fence could have been made by the statute punishable by fine or other penalty. Breach of the law would require suit by the civil authorities to enforce such penalty. Yet the Court below holds the power to sue and recover may be delegated, and the fruits enjoyed by an individual. It matters not that the individual damaged is the party to be thus benefited. If the power exist at all to thus delegate the remedy and its fruits, it could have been bestowed by the legislature at its pleasure. The oldest or the tallest man in the county might have been made the recipient of its bounty. Undeniably, the party suffering the damage is compensated by the recovery of the full amount of that damage. To double it is to give him a gratuity; hand him over the property of the corporation to enjoy for his private use, and without compensation. That gratuity could have been given to any one else with equal reason and equal right.

How can the power be delegated to a person to prosecute under a penal statute for his sole use? If the statute be penal, then the act committed is a wrong. Impartial administration of the law would require that *all* offenders should be prosecuted. Yet can it be denied that the party to whom the right to prosecute and recover is thus delegated may not compound the offence? Compromise the claim before or after suit brought! Unquestionably he may. The administration of justice then becomes subordinated to the individual convenience. Self-interest may supplant duty. The statute may sometimes serve as a convenient basis for extorting compromise, or as a basis for legal redress. The Court below hold the statute a penal one in terms; declare

the doubling of the damage in the nature of a punishment and the reason therefor, the safety of the travelling public. The protection of the public is therefore the groundwork for the penalty. But the *result* of the punishment (the fine) does not go into the public treasury, but into the pocket of a private individual. In other words, the railroad suffers the punishment, the travelling public enjoys the benefit resulting from a possible reform by the offender, and some third party pockets the visible material proceeds.

The offence is not punished as often as it occurs, but as often only as the individual who controls the law may find it convenient and profitable to put it in operation. Such proceeding has not the merit of a *qui tam* action, where the State has equal interest, but is simply a delegation of civil authority to irresponsible parties and without restraint.

But we deny that the statute is a penal one. The declaration of the Court below that it is such is not binding on this Court. The rule which makes the construction of a State statute by its highest judicial authority binding on this Court cannot apply where the constitutional question is raised. The statute must, then, stand the test of judicial scrutiny here, and be judged by its effect and practical operation.' If its terms are penal and its effect remedial, it is a remedial statute and not penal.

Statutes which stand upon the police power of the State are not necessarily penal.

"Whether the prohibited act or omission shall be made
"a criminal offence punishable under the general laws, or
"subject to punishment under municipal by-laws, or, on
"the other hand, the party be deprived of any remedy for
"any right which, but for the regulation, he might have

" had against other persons, are questions which the leg-
" islature must decide."
Cooley's Con. Lim., p. 596. Tit., Police Powers.

Thus the legislature here might have provided that killing of stock should raise conclusive presumption of liability of the railroad company and no defences permitted. That would be a deprivation of a remedy only, and not a penal act. It could not be treated as such.

" A *penal* statute is one which imposes a forfeiture or
" penalty for transgressing its provisions, or for doing a
" thing prohibited."
Potter's Dwarris, p. 74.

But this statute affixes no penalty in the sense of creating a liability to the civil authorities or the people whom they represent, and providing a punishment for a breach of any duty which the law makes a criminal offence. *Per contra*, the liability is to an individual. It is not contended that he has suffered a wrong for which, by natural rules of right or artificial rules of conduct, he is to be compensated. The law discharges its obligation to him and fully protects his rights of property by giving full damages for the injury. Beyond that limit *he* has suffered no injury, and has no right, natural or otherwise, to demand more. Hence a statute which attempts to give him more cannot be regarded as penal unless it be upon the ground that a public injury may be fully compensated by an individual benefit, and to give a gratuity to one operates as a common benefit to all.

Thus in *Reed* v. *Northfield*, (13 Pick, 94,) a statute of Massachusetts gave double damages against a town for an injury to the plaintiff caused by a defect in a highway. The Court, by Shaw, C. J. said :

"We think the action in the present case is purely remedial, and that it has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment; but the distinction is (in the case of a penal action) that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty—, the law gives him enhanced damages, *but they are recoverable to his own use, and in form and substance the suit calls for indemnity.*"

As against a municipality and for personal injuries such a statute could be upheld. But suppose the statute made it the duty of the private individual to keep the highway in front of his dwelling or farm in repair, and gave the owner of stock injured by such failure double the amount of his injury as against such individual? That would neither change the character of the statute nor the nature of the remedy. It would still be, as held above, a remedial statute, and the suit one for indemnity. Yet that would be taking private property for private use, a deprivation of right; a denial of the equal protection of the laws. In short, an unconstitutional exercise of power. Yet the statute could only stand upon the police power of the State, precisely as here. But simply changing the parties and substituting a corporation for a natural person would not change the character nor effect of the law.

The Court below cite a large number of State laws providing double damages or other penalties as upholding the constitutionality of *this* statute. By examination thereof it will be found that they all relate to acts of wilful wrong, things forbidden by positive law, and equally obnoxious to good morals and natural right. Such is not this case. True, the injury here is a tort, but the law distinguishes in

such cases between those acts which are wrongful, as involving a criminal offence or wilful invasion of right, and acts which involve neither of these elements.

"Torts are such wrongs as are in their nature distinguishable from mere breaches of contract, and are often mentioned as of three kinds, viz.: nonfeasance, being the omission to do some act which a person is bound to do; misfeasance, being the improper doing of some act which he may lawfully do; or malfeasance, being the commission of some act which is positively unlawful."

Abbot's Law Dictionary, vol. 2, p. 573.

The act of the railroad company here is a tort of the first class—a mere nonfeasance. If proven to be done with malicious intent, it would then become a tort of the third class—a malfeasance.

The legislature cannot by law make one class of torts equal to the others.

The maxim "enjoy your own property in such manner as not to injure that of another" (Broom's Legal Maxims, 5th Am. ed., 327) is applicable to all men. Yet a person may in the use or enjoyment of his own property accidentally injure the property of his neighbor. That would give an action sounding in damages. It would be a tort—a nonfeasance. The remedy would be the amount of damage actually suffered. But if the injury were wilfully done, and with malicious intent, malfeasance would result; it would be "the commission of some act which is positively unlawful," damages could be increased, and a penalty added.

Yet the legislature could not make a tort resulting from pure accident a positively unlawful act, a thing *mala in se.* It could as well be contended that the legislature may lawfully declare the killing of an animal murder, punishable with death.

Among the acts thus cited by the Court below are those

for "killing or injuring live stock trespassing where there "is no fence." That is an apt illustration of the point we make. It is a malicious act, a malfeasance, and therefore counts in punitive damages. Another is "for *malicious* trespass on personal property," and is of the same class, clearly distinguishable on principle and right from acts done without wrongful intent or resulting from pure accident. There the act must be malicious in order to recover the double damage. Here it is *not* malicious, but the measure of damage is the same. This is a practical illustration of our contention that to this corporation is denied the equal protection of the laws.

A statute of Nebraska gave to the owner of live stock double the value of his property killed, injured, or destroyed on a railroad track in case the same was not paid within thirty days after demand therefor upon the company.

In *Atchison & Nebraska R.R. Co.* v. *Baty*, (6 Nebr., 37) this statute was held unconstitutional upon the broad ground that it was partial, and because "it applies to one class "only." And the Court therein justly observes:

"If, however, the legislature has authority by enact-"ment to declare that for an injury of the kind in question "the injured party shall be entitled to receive 'double "the value' of the property injured, then, does not the "authority imply the power in the legislature to make "it a hundred times the value of the property, and the "excess beyond the damage sustained, whatever it may "be, is so much property taken from one person and given "to another."

And the illustration may be carried still further. If the principle be once admitted, if the power of the legislature be once recognized, then it may with equal power declare a forfeiture or recovery of the full value of the train doing the damage, or even of the whole property of the

road. Admit the principle, and there can be no restraint upon the exercise of the legislative power in fixing the amount or value of the property which is to be taken from the railroad corporation and given to the individual.

The statute is equally obnoxious upon another ground. It applies to one class only, viz: railroad corporations. There is nothing in the letter of the statute to bring private persons or the State—if operating railroads—within its terms. If it be a penal statute as held below, and therefore subject to a strict construction, it could not be extended beyond its terms nor applied to those not falling within its express description. In any view it is class legislation. It applies to railroad corporations, and exempts all others doing the same or kindred business, whether corporations or natural persons.

Upon this head Judge Cooley observes:

"But every one has a right to demand that he be governed by general rules, and that a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but an arbitrary mandate, unrecognized in free government."

Cooley's Con. Lim., p. 392–3.

And in note at p. 393, the author cites *Wally's Heirs* v. *Kennedy*, (2 Yerg., 554,) wherein the Court said:

"The rights of every individual must stand or fall by the same rule or law that governs every member of the body politic, or land, *under similar circumstances*, and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise odious, individuals and corporations would be governed by one law; the mass of the community and those who made the law by another, whereas the like general law

" affecting the whole community equally could not have " been passed."

The full effect of this statute must be considered in this connection. The double liability of the railroad corporation extends not only to direct damage it may inflict, but to all indirect damage—however remote—caused by its failure to fence. The liability is not only twofold, but of boundless limit. No other person or class of persons, natural or artificial, come within its terms. It is limited in its application against one out of many. It is unlimited in its operation against that one.

The effect of such a statute if upheld is mischievous in the extreme. It is a direct inducement to the individual to enrich his pocket at the expense of the corporation. To quote the language of the counsel below:

" This temptation is so strong that it has become al- " most a universal rule among stock-owners along the lines " of railroads neither to repair fences, to close their own " private gates when left open by themselves, or to notify " the company of defects therein, until they have one or " more animals killed or injured, and they then present " claims amounting to twice their actual value, and insist " on such unjust value being doubled, and if they are not " paid, suits are instituted."

It is even found that among a class of practitioners these suits are encouraged upon condition that nothing shall be charged except the *double* part of the damages recovered.

Thus litigation and strife is engendered, and constant encouragement offered to the perpetration of wrong.

We submit the statute should be held inoperative, and the judgments reversed.

A. T. BRITTON,
A. B. BROWNE.

THOS. J. PORTIS,
of Counsel.

Supreme Court, U. S.
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IN THE

Supreme Court OF THE United States,

OCTOBER TERM, 1885.

Error to the Supreme Court of Missouri.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
PETER HUMES,
Defendant in Error.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

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vs.
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Defendant in Error.

STATEMENT OF THE CASE FOR DEFENDANT IN ERROR.

This is an action brought by Humes in the Circuit Court of the city of St. Louis, against the Missouri Pacific Railway Company, to recover double damages for the killing of a mule. The action is based on the following statute of Missouri:

REVISED STATUTES OF 1879, SECTION 809.

Every railroad corporation formed or to be formed in this State, and every corporation to be formed under this article, or any railroad corporation running or operating any railroad in this State, shall erect and maintain lawful fences on the sides of the road where the same passes through, along or adjoining inclosed or cultivated fields or uninclosed lands with openings or gates therein, to be hung and have latches or hooks, so that they may be easily opened and shut, at all necessary farm crossings of the road, for the use of the proprietors or owners of the land adjoining such railroad; and also to construct and maintain cattle-guards where fences are required, sufficient to prevent horses, cattle, mules and all other animals from getting on the railroad; and until fences, open-

ings, gates and farm-crossings and cattle-guards, as aforesaid, shall be made and maintained, *such corporation shall be liable in double the amount of all damages which shall be done* by its agents or cars to horses, cattle, mules or other animals on said road, or by reason of any horses, cattle, mules or other animals escaping from or coming upon said lands, fields or enclosures, occasioned in either case by the failure to construct or maintain such fences or cattle guards. After such fences, gates, farm-crossings and cattle-guards shall be duly made and maintained, said corporation shall not be liable for any such damages, unless negligently or willfully done. If any corporation aforesaid shall fail, neglect or refuse, for and during the period of three months after the completion of its road, through or along the lands, fields or inclosures hereinbefore named, to erect or maintain any fence, openings or farm crossings or cattle guards, as herein required, then the owners or proprietors of said lands, fields or inclosures may erect and maintain such fences, openings, gates or farm crossings or cattle guards, and shall thereupon have a right to sue and recover from such corporation, in any court of competent jurisdiction, the full value of such fences, openings or gates, cattle guards or farm crossings; and if any person shall ride, lead or drive any horses or other animals upon such road, within such fences and guards, other than a farm crossing, without the consent of the corporation, he shall, for every such offense, forfeit and pay a sum not exceeding ten dollars, and shall also pay all damages which shall be sustained thereby to the party aggrieved.

If any person, not connected with or employed upon the railroad, shall walk upon the track or tracks thereof, except where the same shall be laid across or along a publicly traveled road or street, or at any crossing, as hereinbefore provided, and shall receive harm on account thereof, such person shall be deemed to have committed a trespass in so walking upon said track, in any action brought by him, on account of such harm, against the corporation owning such railroad, but not otherwise.

There was a verdict and judgment for plaintiff, for double the value of the animal. This judgment was affirmed in the St. Louis Court of Appeals, and afterward in the Supreme Court of Missouri. To this recovery, the defendant, in due time and manner, objected, on the ground (*inter alia*) that the above statute is "in violation of and in conflict with Section I, Article XIV of the [amendments to the] Constitution of the United States, in that it is depriving the defendant of its property, so far as it exceeds the value of the stock killed or injured, without due process of law, and in that it denies to the defendant the equal protection of the laws."

This objection, in its two branches, presents the only questions to be considered here.

BRIEF FOR DEFENDANT IN ERROR.

I.

The Fourteenth Amendment has no application to this case, since no question of discrimination against the negro race is involved.

II.

The plaintiff in error, being a corporation and not a natural person, can not invoke the protection of the Fourteenth Amendment.

III.

The statute in question does not deny to the plaintiff in error the equal protection of the laws.

1. It is not true, as claimed, that it "prescribes a severer punishment against a railroad company, owner of a railroad, than an individual owner or partnership owner."

2. The fact that it is "directed against railroads alone, no other common carriers being brought within its provisions," is justified by abundant reasons.

IV.

The statute in question does not deprive the plaintiff in error of his property without due process of law.

1. It does nothing more than impose a liability. This liability is recoverable by the ordinary processes of the law. This is due process.

2. The courts will not, under the pretense of determining whether there is due process of law, investigate other constitutional objections to a statute.

3. The statute in question is a police regulation.

(*a*) Independent of the Fourteenth Amendment, the legislature had unquestionable power to enact it.

(*b*) The amendment does not interfere with the police power of the states.

ARGUMENT.

I.

The Fourteenth Amendment has no application to this case, since no question of discrimination against the negro race is involved.

In the Slaughter House cases, 16 Wall., 32, Mr. Justice Miller said (p. 81):

"We doubt very much whether any action of a State, not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race, and that emergency, that a strong case would be necessary for its application to any other."

This language is quoted with approval in—

Strauder v. West Virginia, 100 U. S., 303, at p. 307.

In the same case Mr. Justice Strong further said (at p. 310):

"Its aim was against discrimination, because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discrimination against those who belong to it."

This was quoted and made the basis of the decision in—

State v. Ah Chew, 16 Nev., 50.

Mr. Justice Harlan, speaking for the court, has said that this amendment—

"Was designed primarily to secure to the colored race, thereby invested with the rights, privileges and responsibilities of citizenship, the

enjoyment of all the civil rights that, under the law, are enjoyed by white persons."

Neal v. Delaware, 103 U. S., 370, 386.

These are the expressions of this court upon this point. So far as I have found, it has not gone further. But it is significant that though this court has in many cases been asked to hold state statutes void as in conflict with this amendment, it has never done so except where the statute worked a discrimination against the negroes as a race. If the remaining points relied upon by the defendant in error were much less abundantly supported by reason and authority than they are, I should still expect an affirmance of the judgment in this case upon the authority of these cases.

II.

The plaintiff in error, being a corporation, and not a natural person, can not invoke the protection of the Fourteenth Amendment.

In Insurance Company v. New Orleans, 1 Woods, 85, Mr. Justice Woods said (p. 88):

"Are corporations persons within the meaning of the amendment?" The word occurs three times, in the first section, in the following connections. 'All *persons* born or naturalized in the United States * * nor shall any state deprive any *person* of life, liberty or property, nor shall any state deny to any *person* within its jurisdiction the equal protection of the laws.' The complainants claim that this last clause applies to corporations—artificial persons. Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses, just quoted. If we adopt the construction claimed by complainants, we must hold that the word "person," where it occurs the third time in this section, has a wider and more comprehensive meaning than in the other clauses of the section where it occurs. This would be a construction for which we find no warrant, in the rules of interpretation. The plain and evident meaning of the section is, that the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and consequently natural, and not artificial, persons. This construction is strengthened by the history of the submission by Congress, and the adoption by the states, of the Fourteenth Amendment, so fresh in all minds as to need no rehearsal."

This view has been adopted in California.

Central Pacific R. R. Co. v. State Board of Equalization, 60 Cal., 35.

III.

The statute in question does not deny to the plaintiff in error the equal protection of the laws.

In the brief filed on behalf of the plaintiff in error in the Supreme Court of Missouri, the specifications under this topic were:

1. That the act "prescribes a severer punishment against a railroad company, owner of a railroad, than an individual owner or partnership owner."

2. That it "is directed against railroads alone, while no other common carriers are brought within its provisions."

Assuming that these will be the objections relied on here, we answer:

1. The first is unfounded in fact. It is true that Section 809, the statute in question, names only railroad corporations as the persons bound to fence their railroads. But another section of the same chapter, Sec. 825, provides:

"The term, 'railroad corporation' contained in this chapter shall be deemed and taken to mean all corporations, companies or individuals now owning or operating, or which may hereafter own or operate, any railroad in this state."

This, of course disposes of the question. But if there were no such statute, the result would be the same. Since railroads, except in the rarest instances, are always owned by corporations, it would be the height of refinement to hold Sec. 809 unconstitutional, because it does not in terms impose its duties upon, and denounce its penalties against, individuals as well as corporations. If there is any discrimination, it is merely nominal.

Tredway v. R. R. Co., 43 Iowa, 527.
Johnson v. R. R. Co., 29 Minn., 425.

But though individuals are not named, it is fairly certain that if one happened to own a railroad, being within the reason of the statute, he would be held bound by its provisions and subject to its penalties. In Farrell v. The

Union Trust Company, 77 Mo., 475, the defendant was a New York corporation engaged in operating a railroad in Missouri under a power granted in a mortgage. Being sued under this statute, it claimed exemption from the duties and penalties prescribed, because it was not incorporated in Missouri, and was not a railroad corporation. The language of the statute is:

"Every *railroad corporation* formed or to be *formed in this state*, and every corporation to be *formed under this article*, or any *railroad corporation* running or operating any railroad in this state, shall erect and maintain fences, etc."

Though not coming literally within either of these descriptions, the Union Trust Company was held liable under the statute.

It is noticeable that this case was decided without reference to Section 825, neither court nor counsel having cited it.

Even if the act were directed against corporations alone, there might be good reason for it.

In State v. Matthews, 44 Mo., 529, Wagner, J., said (p. 530): "Corporations are, and of right ought to be, as much subject to police regulation as natural persons. The injury resulting from violations of law by them may be *even greater than* where the infraction comes from individuals."

2. As to the second objection, the obvious answer is that the penalties of this statute are not imposed because railroad companies are common carriers, but because their business is a dangerous one, and that other common carriers either can not, or the public welfare does not demand that they shall be brought within its provisions. How can a fence law be made applicable to steamboats on the navigable rivers, stage companies on the public highways, or street-car companies on the streets of our cities?

But if it be said that this is taking the objection too literally, and that the real complaint is not that other common carriers are not subjected to the same duties and penalties, but that

they are not subjected to duties and penalties of a like character, the answer is that this must be a matter within the discretion of the legislature. If that body finds that the operations of other common carriers are not attended with like danger to life and property as those of railroads, it can not with any show of reason be said that it must nevertheless prescribe equally stringent regulations for them. No principle of law, right or common sense requires this.

Not all common carriers conduct their business in the same way. Hence, they do not all need the same legal safeguards, any more than they need the same mechanical contrivances against danger. Such as the legislature prescribes have reference, not to their character as carriers, but to the dangers of their business. Railroad companies belong to the class of corporations in general, as well as that of carriers. Why does not the plaintiff in error widen his complaint and attack this act because it, or something like it, is not made applicable to all corporations, whatever their character, whether commercial, literary, benevolent or what not? Railroad companies are also tax-payers. Why not complain because all tax-payers are not brought within its provisions?

The Fourteenth Amendment does not undertake to make a Procrustean bed of the law—compelling legislatures to apply statutes to one set of persons and things because they are applied to another, without regard to their suitableness. The power to make rules and regulations appropriate to the wants of the community, in all their varying circumstances, remains as it was before this amendment was adopted.

In Soon Hing v. Crowley (113 U. S., 703), Mr. Justice Field said (p. 708):

"There is no force in the objection that an unwarrantable discrimination is made against persons engaged in the laundry business, because persons in other kinds of business are not required to cease from their labors during the same hours at night. There may be no risks attending the business of others, certainly not as great as where fires are constantly required to carry them on. Specific regulations for one kind of business, which may be necessary for the protection of the public, can never be just ground of complaint because like restrictions are not

imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws. * * * It is not discriminating legislation, in any invidious sense, that branches of the same business from which danger is apprehended, are prohibited during certain hours of the night, whilst other branches, involving no such danger, are permitted."

In Barbier v. Connolly (113 U. S., 27), Mr. Justice Field said (p. 31):

"The Fourteenth Amendment undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all, *under like circumstances*, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, *except as applied to the same pursuits by others under like circumstances;* that no greater burdens should be laid upon one than are laid upon others *in the same calling and condition.*"

In Railroad Company v. Richmond, 96 U. S., 521, an ordinance of the city of Richmond, Virginia, prohibiting the R. F. and P. R. R. Co. from using steam power in Broad street in said city, was assailed as denying to that company the equal protection of the laws. There was no other railroad in Broad street. Chief Justice Waite said (p. 529):

"Other railroad companies may occupy other streets and use locomotives there; but other streets may not be situated like Broad street: neither may there be the same reasons why steam transportation should be excluded from them. All laws should be general in their operation, but all places within the same city do not necessarily require the same local regulations. While locomotives may with very great propriety be excluded from one street, or even from one part of a street, it would be sometimes unreasonable to exclude them from all. It is the special duty of the city authorities to make the necessary discriminations in this particular."

In New Orleans v. Dubarry, 32 La. An. 481; s. c., 39 Am. Rep., 273, it was decided that a license fee may be exacted by a city from keepers of private markets, although none is imposed on persons selling the like articles in the public markets of the city.

In Cincinnati, etc. R. R. Co. v. Commonwealth, 81 Ky. 492, the revenue law of Kentucky was assailed as denying

to railroad companies the equal protection of the laws, because, while all other tax payers were allowed an appeal from assessments made against them for taxation, no such right was given to railroad companies, but the act was sustained.

A glance at some other provisions of the Missouri statutes will show that the assumption of plaintiff in error that railroad companies are subjected to unequal penalties is unfounded, and that, where appropriate, like penalties are denounced against other persons. Many examples will be found collected on pages 17 and 18 of the printed record in this case. One or two will be noticed here.

Water impregnated with salt petre, when drank by live stock, is fraught with as much danger to them as a locomotive running at full speed. A statute has been enacted, requiring all salt petre works to be enclosed with sufficient fences, uuder penalty of double damages, for animals injured by drinking the water. (Rev. Stat. 1879, Sec. 5668.)

Again, steamboats, though not subject to the fence law with its penalty, as the plaintiff in error complains, are not without restrictions. Masters of such vessels are known to be often rough and arbitrary men, and in time past have occasionally taken cord wood for the use of their boats from wood yards on the river bank, without waiting to get the owners' leave, or, having gotten it aboard, have refused to pay the price agreed, or have paid for less than they took. Having an overpowering force, they could do these things with impunity, and once away from the landing could easily defy the sufferer and evade payment. A statute has been enacted imposing upon any master perpetrating any such outrage double damages and twenty dollars besides, and giving a lien upon the boat for payment. Rev. Stat. 1879, Sec. 4269.

These remedies are given, we repeat, not because the salt petre makers are manufacturers, and the steamboatmen common carriers, but because of the risks to the com-

munity incident to the prosecution of these kinds of business. They therefore afford no foundation for a claim that all manufacturers or all carriers should be subjected to like restrictions.

Looked at from another point of view, this act will be seen to make no discrimination against railroad companies. Whilst they are subject to its penalties, they are also entitled to its benefits equally with other persons. If the plaintiff in error happened to be the owner of an animal, and it should be killed on the track of another company under circumstances bringing the case within this act, it could undoubtedly recover double damages, the same as any farmer or other person.

IV.

The statute in question does not deprive the plaintiff in error of his property without due process of law.

1. It is not pretended that the statute undertakes to authorize the seizure and appropriation of defendant's property to the satisfaction of plaintiff's claim without any legal process, or without notice to defendant, or without defendant's having an opportunity to contest the claim. Such a contention could not be supported; for there is nothing to give color to it. The statute only imposes a liability. The language is: "Such corporation shall be liable in double the amount of all damages." The enforcement of the liability is not provided for. That is left to the ordinary processes of the law.

Accordingly, we find, by the record in this case, that the plaintiff in error was duly summoned, appeared, pleaded and had a trial before a jury; and this, substantially, must be the course of procedure in every case arising under this statute. In all this what is lacking to that due process of law which is guaranteed by the Fourteenth Amendment? As we view the matter, it seems so plain that there is nothing left to argue.

But, of course, these considerations have not escaped the learned counsel on the other side. What then must they mean when they continue to insist that the Fourteenth Amendment is violated because the plaintiff in error was adjudged to pay, not the amount of the damage he had done, but double the amount, and this by virtue of a state statute? We have thus far heard no argument in favor of the position, but, if we may offer a conjecture, we think it will be found to involve these two propositions:

a. That any attempt to take property under an unconstitutional state statute is a taking without due process of law, within the meaning of the Fourteenth Amendment; and therefore the courts, and especially the federal courts, when complaint is made that this amendment has been violated, will always inquire into the general constitutionality of the statute.

b. That the statute in question in this case is unconstitutional, because the legislature has no power to give a person whose live stock has been killed or injured by a railroad train a right of action against the company, for an amount in excess of the actual damages.

Assuming that, substantially, these propositions will be maintained by the other side, we proceed to show that they are untenable.

2. It can not be true that, for the purpose of determining whether a state statute violates the guaranty of due process contained in the Fourteenth Amendment, the courts will inquire into its general constitutionality. To make this plain, it need only be remembered that the same guaranty was to be found in the Fifth Amendment, and in the constitutions of, perhaps, all the states before the Fourteenth Amendment was adopted. In no case that I have found arising under the Fifth Amendment, or under the constitution of any state, has such an extended meaning been attributed to this provision. Nor did the courts ever approach the question of constitutionality, when denied on

grounds other than want of notice and opportunity to defend, through the medium of the due process clause.

It was always that objection which brought up the question of compliance with that clause. If the objection went to some other point, as, for instance, that the statute authorized the taking of private property for public use without just compensation, that was treated as an independent question; and if the fact was so found, the statute was held void, as being in conflict with the constitutional provision on that subject. No court or lawyer ever thought of arguing that such a statute was a violation of the due process clause, because, to take private property for public use without compensation, was forbidden by the eminent domain clause, and any taking of property under a statute violating the constitution, in any particular, was a taking without due process of law. Any such argument would have been thought absurd. If the statute was a violation of the eminent domain clause, it was for that reason unconstitutional, and that ended the matter, without appealing to the other clause. And so, if the statute was found open to any other of the many constitutional objections that might be raised, it was held void on that specific ground. To go further was useless.

Now, can there be a reasonable doubt that, when the country adopted this amendment, it took the old, familiar phrase, "deprive any person of life, liberty or property without due process of law," in the sense in which it has always been received and understood, that it would raise the same kind of questions as before, and that compliance with its terms would be ascertained by the application of the same principles as had always been applied.

The Fifth Amendment authorized any court, state or federal, to inquire whether acts of Congress provided for the requisite notice to defendants and opportunity to defend. The several state constitutions authorized the State Courts, Circuit Courts of the United States, and (when a case came

from the Circuit Court) this court, to inquire into the same question touching state legislation. But when the question came from the highest court of a state, this court was not authorized to make the inquiry. In other words, it was not a federal question. The Fourteenth Amendment has supplied this defect; so that, in whatever way a case comes up, this court may now bring any state statute to the test of the recognized principles of constitutional law on this subject.

Its object is to assure to the citizens of every state the right to have notice and opportunity to defend any action at law affecting them, either in person or property. It was not intended as a safeguard against any and every form of unconstitutional legislation. To give it such a construction would be to draw to this court the ultimate determination of every question touching the interpretation of state constitutions and the constitutionality of state laws. Heretofore it has been thought that the courts of the several states could best decide all such questions. For this reason, even in cases where it had the right to exercise an independent judgment, this court has, with rare exceptions, been accustomed to defer to the opinions and follow the decisions of the state courts on these questions. But, if this amendment is to receive the construction suggested, all this is changed. Every question of constitutionality of state legislation becomes a federal question. This court, and not the state court, is the final arbiter; and its decision is in all cases paramount. It is impossible to believe that so extraordinary a change has been wrought by the use of words so familiar, and which on their face signally fail to betray so deep a meaning.

It may be true, in a sense, that to take away a man's property under the forms and sanctions of a statute, is to deprive him of it without due process of law if the statute is unconstitutional, as already shown; but this is a remote and unusual interpretation to give to the "due process" clause.

In Walker v. Sauvinet (92 U. S., 90), Chief Justice Waite said (p. 93):

"Due process is process due according to the law of the land. This process in the state is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land—that is to say, with the constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. Here, the State Court has decided that the proceeding below was in accordance with the law of the state; and we do not find that to be contrary to the constitution or any law or treaty of the United States."

In Davidson v. New Orleans, 96 U. S., 97, Mr. Justice Miller, commenting on the frequency with which litigants appear in this court invoking the due process provision of this amendment, says (pp. 104, 105):

"In fact, it would seem from the character of many of the cases before us and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinion of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation upon which such a decision may be founded. * * * It (a judgment for taxes) may violate some provision of the state constitution, against unequal taxation; but the Federal Constitution imposes no restraints on the states in that regard. * * * It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court, as we were in Loan Association v. Topeka, (20 Wall. 655). But, however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable in such a case. This was clearly stated by this court, speaking by the Chief Justice, in Kennard v. Morgan (92 U. S. 480), and in substance repeated in McMillan v. Anderson, (95 U. S., 37.)

3. The statute in question is a police regulation. Its object is, by compelling railroad companies to fence their lines, to keep live stock out of the way of trains, and thus afford greater security to the traveling public, to property in transit and to the stock itself.

State v. Matthews, 44 Mo. 523, 529.
Trice v. R. R. Co , 49 Mo. 440.
Gorman v. R. R. Co., 26 Mo. 441, 450.
Barnett v. R. R. Co., 68 Mo. 56, 62.
Spealman v. R. R. Co., 71 Mo. 435.
Berry v. R. R. Co., 65 Mo. 172, 175.

Fletcher v. R. R. Co., 73 Mo. 143.
Revelle v. R. R. Co., 74 Mo. 438, 441.

See also numerous authorities cited in Cooley on Constitutional Limitations,* 579, and note 1.

a. In the exercise of the police power, the Legislature may impose upon a wrong doer a liability, recoverable in a civil action at the suit of the party injured, beyond that of responding merely to the amount of the damage he has done.

Statutes of this kind are numerous in all the States. Some have been enacted since the adoption of the Fourteenth Amendment. Most of them ante-date it. Some of them are as old as the Constitution itself. Whether new or old, they all grow out of the pressing necessity or extraordinary difficulty of enforcing some right or duty, the frequency or facility with which it is violated, extraordinary dangers or evils flowing from such violations, or the vexatious character of the offense. In all this class of cases the injury to private right is greater and more direct than to the public. Very many of the offenses are of a petty kind, and all are of such a character that it is probable the spur of private interest can better be relied on than the promptings of official duty to secure the enforcement of the laws. Some of these statutes impose a fixed sum as a penalty; some, a fixed sum in addition to the actual damage, or the actual damage and attorney's fees, or extra costs; some, an amount varying with the damage, as double, treble, or quadruple damages. In one case, one hundred fold damages are allowed. (See California Civil Code of 1874, Sec. 538—for malicious injury to telegraph wires, etc.)

It is for the Legislature to determine whether offenses shall be punished in this way or in some of the modes in which crime is ordinarily punished.

Houston, etc. R. R. Co. v. Harry, 18 Am. and Eng. R. R. Cases, 504, (Texas Supreme Court).

Trice v. R. R. Co., 49 Mo. 440.
Peoria, etc. R. R. Co. v. Duggan, 109 Ill. 537.
Johnson v. R. R. Co., 29 Minn., 425.

The following cases will be found to sustain to the fullest extent legislation of this sort:

Cairo, etc. R. R. Co. v. Warrington, 92 Ill 157, was an action against a railroad company, founded on a statute authorizing recovery of double damages. The defense was, that the statute violated the provision of the Illinois Constitution, that no person shall be deprived of life, liberty or property without due process of law. The opinion of Ch. J. Walker is a masterly vindication of the constitutionality of the act.

To the same effect is *Cairo, etc. R. R. Co. v. Peoples*, 92 Ill. 97.

We call special attention to these two cases.

In *Tredway v. R. R. Co.*, 43 Iowa, 527, a like statute was assailed as denying to railroad companies the equal protection of the laws in violation of the Fourteenth Amendment. It was sustained in most emphatic terms.

In *Jones v. R. R. Co.*. 16 Iowa, 6, the same statute was assailed as violating the provisions of the State constitution, that "all laws of a general nature shall have a uniform operation." This provision is an equivalent for the "equal protection" clause of the Fourteenth Amendment. The result was the same.

In *Little Rock, etc. Ry. Co., v. Payne*, 33 Ark., 816; *s. c.* 34 Am. Rep. 55, a like act was assailed, with like result.

In *Peoria, etc. R. R. Co. v. Duggan*, 109 Ill., 537, an act allowing "reasonable attorney's fees," in addition to the value of the animal killed, was upheld as a valid police regulation, and no violation of the prohibition in the State constitution against special legislation.

In *Kansas Pacific R. R. Co., v. Mower*, 16 Kan., 573;

s. c. 3 Cent., L. J. 641, an act like the last was assailed because it allowed the plaintiff to recover attorney's fees in case he succeeded, but made no such provision in favor of the railroad company where it made good its defense. This, it was claimed, was a violation of the State constitution which guaranteed to all "equality of rights and remedies for injury, by due process of law." The act was sustained by Brewer, J., in an elaborate opinion.

In *Johnson v. Railway Co.*, 29 Minn., 425, the act allowed the plaintiff to recover $10 extra costs in the justice's court, and double costs in the district court. It was attacked as discriminating and partial legislation, but was upheld.

In *Craig v. Gerrish*, 58 N. H., 513, and in *Quimby v. Woodbury*, 1 New Eng. Reporter, 58, a statute authorizing recovery of double damages for a dog-bite was held to be penal, and, for, that reason, not unconstitutional.

See also:

Mo. Pacific Ry. Co., v. Haley, 25 Kan., 35, 53.

Brown v. Swineford, 44 Wis., 282, 287; *s. c.* 7 Cent. L. J., 208; 28 Am. Rep., 582.

Le Forest v. Tolman, 117 Mass., 110.

In Missouri the act under discussion, and kindred acts, have been assailed on many grounds—always with the same result.

In *Blewitt* v. *Smith* (74 Mo., 404) the Trespass Act was attacked on the ground that the imprisonment authorized by it for non-payment of a judgment for *treble* damages recovered under it by the plaintiff was imprisonment for debt, and the act was therefore violative of section 16, article II. of the state constitution; but the act was sustained.

In *Barnett* v. *Railroad Company* (68 Mo., 56), *Spealman* v. *same* (71 Mo., 434), and *Cummings* v. *same* (70 Mo., 570) the act now before the court was assailed on the ground that the double damages, being a

penalty, under Section 8, Article XI., of the state constitution, should go to the school fund, and not to the party injured. The Fourteenth Amendment was also invoked against it; but all without effect. In the present case, its validity was questioned in the courts below on the ground that the recovery of anything beyond actual damages was taking defendant's private property for plaintiff's private use, in violation of Section 20, Article II., of the state constitution. This is the most plausible of all the objections raised to this class of legislation, but in a convincing opinion, found at page 15 of the printed record, Mr. Commissioner Philips disposes of it adversely.

In *Trice* v. *Railroad Company* (49 Mo., 438) the same objection had been made and overruled.

In *Gorman* v. *Railroad Company* (26 Mo., 441) the validity of this act was denied so far as concerned companies chartered before its passage, on the ground that, in requiring them to fence their roads, it imposed on them an additional burden; and was, therefore, a violation of their charters and an impairment of their contracts with the state; but this objection also was overruled, the court distinctly resting the constitutionality of the act on the police power (see pp. 450–451).

In *State ex rel. Ferguson* v. *Moss* (69 Mo., 495) a statute authorizing treble taxation as a penalty for a false return was sustained, in spite of many constitutional objections.

These decisions may fairly be said to put at rest, so far as the courts of Missouri are concerned, all questions as to the validity of such enactments. But they were hardly needed for that purpose. The settled practice of all the states show, beyond controversy, that there is nothing in statutes of this kind contrary to the eternal principles of justice—to that "law of the land," which we are told is the equivalent of "due process of law." That practice, originating in the earliest period of the common law, con-

tinued by the founders of the governments of the several states, and their successors, down to the time of the Fourteenth Amendment, and further continued since then by all the state legislatures, has resulted in putting on the statute books of the states hundreds of enactments, every one of which must fall if the objection now made to the Missouri act is to prevail.

McMillan v. Anderson, 95 U. S., 37.

The principle already pointed out, upon which they all rest, has hitherto lived and flourished alongside of that other, which is now invoked for their destruction. Never until lately, has it been supposed that there was any incompatibility between the prohibition against the taking of property without due process of law, and the giving of double (or, if necessary, greater) damages to a sufferer from the malice, willfulness or negligence of another. He who asserts it now must claim new light upon Magna Charta. If double-damage statutes are a violation of the guarantee of due process, as found in the Fourteenth Amendment, they must equally be a violation of those state constitutions, which, before and since the Fourteenth Amendments, have given their citizens the same guaranty. Yet this has never been held. This fact alone is a complete answer to the position of the plaintiff in error.

b. The Fourteenth Amendment does not interfere with the police power of the states.

Barbier v. Connolly, 113 U. S., 27, 31.
Bartemeyer v. Iowa, 18 Wall., 129, 138.
County of San Mateo v. R. R. Co., 17 Fed. Rep., 722, 741.

The dominancy of the police power over all other considerations has been strongly asserted by this court.

Stone v. Mississippi, 101 U. S., 814.
Fertilizing Company v. Hyde Park, 97 U. S., 659.
Beer Company v. Massachusetts, 97 U. S., 25, 32.

Butchers' Union Co. v. Crescent City Co., 111 U. S., 746.

Since legislation like the act in question falls within the police power and, before the Fourteenth Amendment, was universally regarded as constitutional, we think it must be so still.

Respectfully submitted,

T. K. SKINKER,

Counsel for Defendant in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1885.

No. 57.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

VINCENT TERRY.

In Error to the Supreme Court of the State of Missouri.

STATEMENT.

This was an action, by defendant in error, under section 809 of the Revised Statutes of Missouri, to recover double damages for certain live stock killed by the engine and cars of the plaintiff in error.

The action was originally commenced before a Justice of the Peace, in the township, in Pettis county, Missouri, in which the killing occurred, where the defendant in error recovered judgment.

The plaintiff in error took an appeal to the Circuit Court of Pettis county, Missouri, where, on a trial anew, the defendant in error recovered a verdict for three hundred and fifteen dollars damages. On motion of defendant in error, and against the objections of plaintiff in error, the Circuit Court rendered judgment in double the amount of the damages assessed by the jury, as provided in said section 809, Rev. Stat. of Mo.

This judgment was entered at the May term, and on the 7th day of May, 1881.

Motions for new trial, and in arrest of judgment, having been overruled, the plaintiff in error filed its affidavit and bond for an appeal; and an appeal was granted by said Pettis Circuit Court, to the Supreme Court of the State of Missouri, on May 12th, 1881—which, under section 3717, Rev. Stat. of Mo., was returnable to the October, 1881, term of said Supreme Court; and under the same section, the transcript in the cause should have been filed in said Court fifteen days before said term.

The appellant in that Court (plaintiff in error here) did not cause a transcript to be filed, as provided by said statute, but, on April 1, 1882—after the adjournment of the October term, 1881, of the Supreme Court of Missouri—a partial and imperfect transcript was filed in that Court. It is a copy of that incomplete record which has been filed in this Court, but, from what is there set forth, and from the affidavits filed in the Supreme Court of Missouri, the nature of the suit and the character of the proceeding can be ascertained.

The clerk of the Supreme Court of Missouri, inadvertently omitted from the transcript forwarded to this Court, a portion of the affidavits above mentioned. By stipulation, filed in this Court, *certiorari* has been waived, and the record perfected by filing certified copies of the omitted affidavits, which has been done, and the same are now on file with the record in this Court, to be regarded as a part thereof.

After the plaintiff in error (appellant below) had filed this imperfect transcript, out of time, the defendant in error filed his motion, under said section 3717, for an affirmance of the judgment of the Pettis Circuit Court.

That motion was sustained, and the judgment affirmed, by the Supreme Court of Mo., on the 26th day of June, 1882. Thereupon the plaintiff in error sued out its writ, and brings the case here, complaining that the statute, under which the action was brought, is repugnant to the Constitutions of the State of Missouri and of the United States.

BRIEF AND ARGUMENT.

I.

This case is not subject to re-examination by this Court. The validity of a statute of the state, on the ground of being repugnant to the Constitution of the United States, was not drawn in question before the Supreme Court of Missouri.

No such question was raised or presented to that court; neither was such question passed upon by that court, nor was its decision necessary to the disposition made of the case.

Murdock *v.* Memphis, 20 Wall., 590.
Bolling *v.* Lersner, 91 U. S., 594.
McManus *v.* O'Sullivan, *Ib.*, 578.
Brown *v.* Atwell, 92 U. S., 327.

The Supreme Court of the State disposed of the case under section 3717 of the Revised Statutes of Missouri.

The plaintiff in error, (defendant below) had procured the granting of an appeal from the Circuit Court to the State Supreme Court, on the 12th day of May, 1881. (Printed Record, p. 14.)

The next ensuing term of the Supreme Court commenced on the third Tuesday in October, 1881.

(Const. of Mo., Sec. 9, Art. VI.)

Under said section 3717, the appeal in this case, having been taken thirty days before said October term, 1881, was returnable to that term, and it was the duty

of said appellant to have caused to have been filed in said Supreme Court, a transcript of the record, at least fifteen days before said October term, 1881.

This the appellant failed to do, and did not file a transcript until the first day of April, 1882.

(Printed Record, p. 2.)

The defendant in error (plaintiff below) having filed in the State Supreme Court the transcript showing that an appeal had been allowed, (Printed Record, p. 15) it became the duty of that Court to affirm the judgment, without passing upon any questions, federal or otherwise, which might be involved in the case.

Such was the character and extent of the judgment of that Court, on account of which the present writ of error is taken. (Printed Record. p. 17.)

Clearly, no question as the constitutionality of any statute of the State was presented to, or decided by, that Court.

Whether or not good cause was shown why the case should not be so disposed of, was a question for that Court alone, and must be considered as concluded by the judgment rendered.

Notwithstanding the Circuit Court, which tried the case, might have erroneously decided that a statute was constitutional, still the judgment was valid and binding, until reversed upon some proper proceeding, on appeal or writ of error—just as any other judgment would be, although there were an erroneous decision upon some other question of law.

If no appeal had been taken at all, this Court could, by no possibility, review this case; and the effect of the statute and the judgment of the Supreme Court, is

to place the case in the same condition as though no appeal had been taken. Under the laws of Missouri, every person has the right to sue out a writ of error at any time within three years after the rendition of judgment. But if, after the lapse of that time, a party sues out his writ, and the Supreme Court should dismiss it, because not timely, will it be contended that this Court should review the case?

The Supreme Court of Missouri, by its judgment, said, although the right of appeal had existed, and although, by the exercise of proper diligence, the plaintiff in error would have been entitled to a re-examination of of the questions in the case—yet, under the law of the State, it had, by its own delays and negligence, lost these rights; and therefore it was not within the duty or the power of that Court to pass upon the question involved.

I submit, that, in order to authorize this Court to re-examine the judgment of a State Court, the Supreme Court of the State—that being the Court of final resort in this instance—must have regularly and properly had the case before it, so as to have acquired jurisdiction to pass upon the same questions, asked to be reviewed here; and that judgments of the Supreme Courts of the states, dismissing or affirming cases on appeal or writs of error, because of their being out of time, or because of a disregard of, or irregularities in, the practice pertaining to such matters, do not afford proper occasions for this Court to enter upon a re-examination of the cases.

But the statute involved in this case is not unconstitutional. This case is to be submitted with others, in-

volving the same statute, and to which the previous point has no application. Upon the question of the constitutionality of the law, the following is submitted:

II.

This law, now section 809 of the Revised Statutes of Missouri, formerly section 43, Art. II, Chap. 37, of Wagner's Missouri Statutes, has been several times passed upon and construed by the Supreme Court of the state. It has uniformly been held to be a police regulation, having for its primary object the protection of passengers upon railroad trains.

Gorman *v.* P. R. R. Co., 26 Mo., 441.
Clark *v.* H. & St. J. R. R. Co., 36 Mo., 219.
Trice *v.* H. & St. J. R. R. Co., 49 Mo., 440.

Subsequently to the above cases, the question of the constitutionality of the law was pressed upon the State Court, and it was again decided to be a police regulation, and, as such, not in conflict with the Constitution of the State.

Barnett *v.* A. & P. R. R. Co., 68 Mo., 56.

In this case, the various objections urged were fully considered, and the conclusion there reached was that the law did not violate any of the provisions of the State Constitution, as to which it was claimed there was a conflict.

This case has since been approved and followed, and is the settled law of the State.
Cummings *v.* St. L., I. M. & S. R'y Co., 70 Mo., 570.
Spealman *v.* Mo. P. R'y Co., 71 Mo., 434.
Blewett *v.* Smith, 74 Mo., 407.

As far as the character of the law, and its harmony with the State Constitution, is concerned, this Court will adopt the decisions of the State Court.

Stone *v.* State of Wisconsin, 94 U. S., 181.
South Ottawa *v.* Perkins, 94 U. S., 260.

III.

It is urged further, that this law violates section 1, of Art. 14, of the Amendments of the Constitution of the United States.

The law only authorizes a recovery of the double damages, by judgment, rendered upon regular proceedings in courts of competent jurisdiction. It, therefore, does not deprive any one of property without due process of law, unless the statute itself is of a character prohibited by the Constitution.

The courts will not declare a law to be void, unless it clearly appears that it violates some provision of the Constitution.

"Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the Legislature should be sustained."

Munn *v.* Illinois, 94 U. S., 113.

But the Constitution does not deny the States the right to enact such laws as an exercise of the police power.

Thorpe *v.* Rut. & Bur. R. R., 27 Vt., 140.
Cooley on Const. Lim., 573-579.

The use of a railroad is public.

Olcott *v.* Supervisors, 16 Wall., 678.

And being such, it is subject to public regulation, and to legislative control.

Munn *v.* Illinois, 94 U. S., 113.
C., B. & Q. R. R. Co., *v.* Cutts, *Ib.*, 155.
Peik *v.* C. & N. W. R'y Co., and
Lawrence *v.* Paul, *Ib.*, 164.
C. M. & St. P. R. R. Co., *v.* Ackley, *Ib.*, 179.
W. & St. P. R. R. Co., *v.* Blake, *Ib.*, 180.

It is very plain that a law to regulate railroads does not operate equally upon all citizens, because all do not own railroads, but that fact does not render the law void.

In Thorpe *v.* Rut. & Bur. R. R. Co., *supra*, Redfield, C. J., in discussing a similar question, said: "It makes no difference how few or how many persons a statute will be likely to affect. If it professes to regulate a matter of public concern, and is in its terms general, applying equally to all persons or property coming within its provisions, it makes no difference in regard to its character or validity, whether it will be likely to reach one case or ten thousand."

That case was quoted, with approval, by this Court, in Slaughter House Cases, 16 Wall., 62.

Nor is the law rendered void, because it permits a recovery in double the amount of the damage sustained.

Having authority to require railroad companies to fence their tracks, the Legislature has the power to compel a compliance with the requirement. If it can prohibit the evil, it can apply the remedy. That portion of the section which requires the tracks to be fenced is the police regulation, and the portion which makes the companies, in case of failure of compliance, liable for

double damages, is remedial. The remedy is a matter of legislative discretion and judgment, which will not be interfered with by the courts.

Cooley on Const. Lim., 168-169.

It must be assumed here, that the remedy provided was the most efficacious for the enforcement of the law, and that it was not only a proper one to apply, but the necessary one.

In Munn *v.* Illinois, *supra*, this Court said: "For our purposes, we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute, now under consideration, was passed. For us, the question is one of power, not of expediency. If no state of circumstances could exist, to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge."

It is true that, as an incident of the remedy provided by the statute, the owner of the injured stock is compensated for his loss but, at least all that which is above the actual value, must be regarded as a penalty for failing to comply with the police regulation, as has been decided by the Supreme Court of Missouri, in the cases cited above.

The statute cannot be construed as providing that, if stock be injured upon an unfenced railroad, the owner shall be *compensated* in double the amount of the damage sustained.

After requiring that lawful fences, etc., shall be erected and maintained, it provides: "And, until fences,

etc., as aforesaid, shall be made and maintained, such corporation shall be liable, in double the amount of all damages, which shall be done by its agents, engines, or cars, to horses, etc., occasioned in either case by the failure to construct or maintain such fences, etc."

The legislative mind was certainly directed to the police regulation, which had been prescribed in the former part of the section, and to the enforcement of a compliance therewith.

The effort, in the latter part of the section, was to apply a remedy—not to the loss of the owner of the stock, by way of compensation, but to a neglect of the regulation, by way of a penalty.

It has been urged that, if the statute is penal, then it is void, because it permits the owner of the injured stock to recover the penalty, instead of the State. This point, however, is based mainly upon section 8, of Art. XI, of the Constitution of Missouri, and in that regard it is concluded by the Missouri cases cited above.

That section was construed to regulate the application of such fines and penalties as might be recovered by the State; but not to be an inhibition upon the power of the Legislature to authorize a recovery of a penalty by an individual.

Similar statutes, giving double damages for stock injured, have been sustained in other States.

L. R. & F. S. R'y Co. *v.* Payne, 33 Ark., 816.
C. & St. L. R. R. Co. *v.* Peoples, 92 Ill., 97.
C. & St. L. R. R. Co. *v.* Warrington, *Ib.*, 157.

There is nothing in the Constitution of the United States which forbids the Legislature to enact laws which enable private citizens to recover and enjoy penalties.

It often is the case, that such is the only practicable and efficient method of enforcing a legislative regulation. But whether or not it is the wisest or the best method, is a matter of legislative discretion, with which the courts will not interfere.

Instances in which the legislative descretion has given to private citizens the right to recover penalties, are frequent in all the States.

As double and treble damages in trespass; (Rev. Stat. of Mo., secs. 3921, 3922) a certain per cent., in addition to interest and actual damages, upon protest of commercial paper (*Ib.*, secs. 539, 540), and for failure to execute proper releases of satisfied mortgages (*Ib.*, sec. 3312), and for prosecuting frivilous appeals (*Ib.*, sec. 3777); a fixed sum, in addition to actual damages, for injury to baggage, or for refusing a check therefor (*Ib.*, sec. 804); a fixed sum for failure to ring the bells, or sound the whistles of locomotive engines at public crossings (*Ib.*, sec. 806); treble damages to a railroad company for injury to its property (*Ib.*, sec. 808); a fixed sum for solemnizing marriages contrary to statute, or failure to certify marriages, or to record the same (*Ib.*, secs. 3269, 3270, 3271), and numerous other cases in the statutes of Missouri, and of the other States, which will suggest themselves.

All *qui tam* actions stand in the same condition. Many of these laws have been passed upon and sustained, while the others have passed unchallenged for years.

As was said in the case of Cairo & St. L. R. R. Co. *v.* Warrington, *supra:* "If these enactments do not establish the constitutionality of the law under considera-

tion, they do show that the legislative and executive departments of the government have, since its foundation, supposed such legislation is not inhibited by the fundamental law. Those departments are under the same obligation to observe and conform to constitutional requirements, as is the judicial branch of the government; and the validity of such laws not having been questioned for such a long series of years, is no light consideration in passing on the validity of a law."

If the statute, complained of in this case, is void because it permits the injured party to recover the penalty, then all laws which allow a private person to sue for a penalty must be void also; and to place the stamp of unconstitutionality upon such enactments would revolutionize the statute law of every State in the Union.

It will, perhaps, be claimed, further, that this statute is void, because it discriminates against railroads constructed and operated by corporations. An examination of the statutes of the State will show, however, that this law does, and must, operate in the same manner, upon all railroads now in existence, or, which may hereafter be constructed, in the State of Missouri; and that this criticism is one of words, rather than of substance.

It is unnecessary to enter upon any discussion concerning the power of the Legislature to regulate the operation and management of railroad corporations, as such, and as distinguished from individuals, for the reason that, under the laws of Missouri, no one, except corporations, is permitted to construct and operate railroads.

At this day, no question will be made but that a railroad is an improved modern highway, constructed for

public use. "Whether the use of a railroad is a public or private one, depends, in no measure, upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private, the use is public."

Olcott *v.* Supervisors, *supra*.

It is upon this characteristic of railroads that the courts have justified the exercise of the right of eminent domain to aid in their construction. Without the exercise of that right, no railroad could be constructed or operated.

"The right to appropriate private property to public use lies dormant in the State, until legislative action is had, pointing out the occasions, the modes, conditions and agencies for its appropriation."

Cooley on Const. Lim. 4th Ed., 657.

The Legislature may delegate to individuals, or corporate bodies, the authority to exercise this power of the State. *Ib.*, 672.

It follows, that, until a proper law is enacted, no one can exercise the power, or do those things dependent upon it; and when a law is passed, delegating the power, then, only those clearly included within the authority can assume to act under it. Such laws are not to be enlarged by intendment. *Ib.*, 660.

If we now address ourselves to the statutes of the State of Missouri, we will search in vain for any authority to construct or operate railroads, other than that to be found under the head of "Corporations," in Article 2,

of Chapter 21, of the Revised Statutes of 1879 (formerly Article 2, of Chapter 37, of Wagner's Missouri Statutes).

The scope of this Article is, first, to provide for the formation of railroad corporations; then, to authorize *them* to condemn and use private property in the construction and operation of railroads; and then, further, to impose various regulations and liabilities.

As a liberal enlargement of the scheme of this article, as above stated, section 790 permits "any *railroad company*, duly incorporated under the laws of any other State, or of the United States, to lease, purchase, extend, construct, maintain and operate its railroad in this State," and for that purpose extends to them the rights, powers and privileges enjoyed by local corporations.

In no other statute of the State (unless it be some special charter of a railroad corporation) is there any delegation of those sovereign powers, essentially a part of the "functions of the State," performed in the operation of a railroad, of which "the use is public."

It is evident, then, that no person, or association of persons, can lawfully construct or operate a railroad in the State of Missouri, except a railroad company, duly incorporated, either under the laws of that State, or of some other State, or of the United States.

Section 809—the one under consideration—is found in this Article 2, of Chapter 21, and is one of the regulations prescribed for the management of railroad property.

When that section provides that "every railroad corporation formed, or to be formed, in this State, and

every corporation to be formed under this article, or any railroad corporation running or operating any railroad in this State, shall erect and maintain lawful fences, etc.; and, until fences, etc., shall be made and maintained. such corporation shall be liable in double the amount of all damages, etc.," it necessarily prescribes a regulation, and fixes a penalty, applicable to every railroad in the State.

This section, when considered, together with the whole chapter, of which it constitutes a part, and in connection with the statutory system of the State, must be regarded as operating upon, and as comprehending, *all* railroads as a class; and, it cannot fairly be said to make any discrimination between individual owners of railroads.

It does not abridge the privileges or immunities of any citizen of the United States; it does not deprive any person of his property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws, because, both in its letter and in its spirit, it affects equally—in the same manner and to the same extent—all who may, now or hereafter, lawfully own or operate railroads in the State of Missouri.

The result is that it must be conceded that the Supreme Court of Missouri has determined the validity of the law in question, under the State Constitution; and as to the Federal question, the conclusion must be that the statute is a police regulation—which, together with the penalty for non-compliance, the Legislature had the power to prescribe; that fixing the penalty in double the amount of the damages, and making the same recoverable by the injured party, were matters properly within the

legislative discretion, with which the courts will not interfere; and that the statute operates upon all railroads in the State.

For these reasons it should be held that it does not conflict with any provision of the Federal Constitution, and is therefore a valid law.

Respectfully submitted,

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For Defendant in Error.